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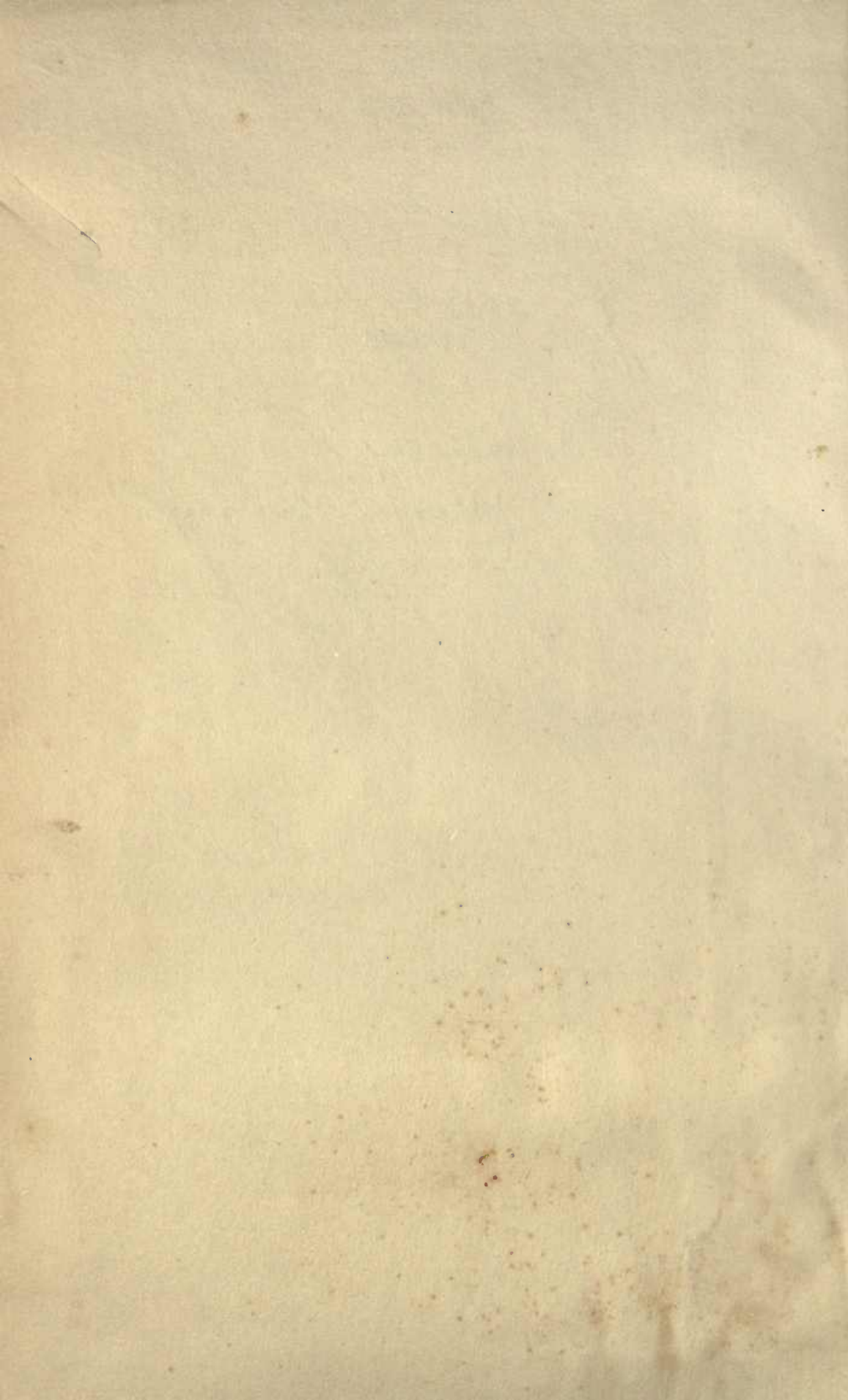
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J. L. Oliver,

In memory of a
pleasant journey.
Excelsior.



NATIVE LAW AND CUSTOM

BEING A COMPENDIUM OF THE RECOGNISED NATIVE CUSTOMS IN FORCE IN THE NATIVE TERRITORIES OF THE COLONY OF THE CAPE OF GOOD HOPE, TOGETHER WITH LEGISLATIVE AMENDMENTS

AND

REPORTS OF SOME OF THE MORE IMPORTANT DECISIONS OF THE NATIVE APPEAL COURT OF GRIQUALAND EAST, 1901-1909

BY

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1911

NATIVE LAW AND CUSTOM

Being a compilation of the customs
and laws of the various
tribes of the North American
continent, as reported by
the various explorers and
settlers, with a full
index of the names of the
tribes and of the laws.

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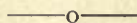
TO
SENATOR, COLONEL, THE HONOURABLE
WALTER ERNEST MORTIMER STANFORD, C.B., C.M.G.,

AS A
TRIBUTE TO HIS LONG AND EMINENT SERVICES TO THE
INHABITANTS OF THE NATIVE TERRITORIES
OF CAPE COLONY, WHILE SECRETARY
TO THE NATIVE AFFAIRS
DEPARTMENT,

AND
AS A TESTIMONY TO THE IMPARTIALITY, JUDICIAL
DIGNITY AND INSIGHT INTO NATIVE CUSTOMS
WHICH HE DISPLAYED WHILE CHIEF
MAGISTRATE OF GRIQUALAND EAST,

THIS BOOK
IS
(BY PERMISSION)
RESPECTFULLY DEDICATED
BY
THE AUTHOR.

PREFACE.



The object of this work is to lay before those interested therein the recognised Native customs at present obtaining in the Native Territories of Cape Colony. Legislative enactments and Colonial law are referred to, but only in so far as they affect Native customs.

There is an idea prevailing that the natives in these Territories are not subject to Colonial law, and that cases between them are always decided by the Courts there according to Native customs; but this is not the case.

Colonial law is applied to every case which can be met under it, and it is only in those cases where the obligations between the parties arise out of customs foreign to, and which cannot be dealt with under, Colonial law, that recourse is had to Native law.

Practically the only actions between natives which are now tried under Native law are those arising out of marriage by Native forms, dowry contracts, adulteries, seductions, kraal-head liability, inheritance and the like, the Native customs in respect of which have always been adhered to.

Customs have only to a certain extent been recognised by the Courts, as it has been found that some of them are tainted with slavery, or are adverse to the interests of morality, whilst others are in direct conflict with Proclamations. For instance, the natives consider that a woman's services to her husband's

kraal after his death are one of the considerations for which her dowry is paid, and, according to true or "raw" custom, return of her dowry could be demanded by her deceased husband's people should she leave their kraal; but the courts have refused to allow dowry to be reclaimed on that ground, holding this custom to be detrimental to the welfare of widows. Further, by Proclamation every female native of twenty-one years is a major, and freed from tutelage, and this now prevents these claims for return of dowry being brought.

Knowledge of pure Native law is therefore not of such great importance to the practical lawyer as hitherto. Likewise, the earlier decisions of the courts are of little practical use, and are now often overruled, for they were given at a time when pure Native customs were more or less strictly adhered to, and when the tactful authorities probably deemed it advisable not rigidly to introduce European ideas and improvements into Native customs, as is now being done.

Bearing in mind these facts, the writer has based this book mainly on the more recent decisions of the Native Appeal Courts.

Up to the present there is no work of this kind in existence, and the writer, who for some years practised in the Territories, has himself felt the want of a book of reference such as this work aims to supply.

The knowledge of Native customs which the writer has acquired in dealing professionally with Native litigants has proved invaluable in the compilation of this work; but this book is not written as representing his own interpretation of the laws and customs pertaining to the Natives in the Territories. It is throughout based on decisions of the Supreme Court, and of the Eastern Districts Court (mostly at the time when these Courts had appellate jurisdiction over the Territories), and of the Native Appeal Courts of the Transkei, Tembuland, and East Griqualand (from 1895 to 1909). Statutes, Proclamations, and

MacLean's "Compendium of Kaffir Laws and Customs" are also referred to.

The decisions of the Native Appeal Courts referred to in this book will, with some exceptions, be found reported in Henkel's "Native Appeal Courts Reports," or Warner's "Native Appeals," or at the end of this book.

It will be seen, from a study of this work, that, speaking generally, the same customs are common to all native tribes. Nevertheless, the name of the tribe, or tribes, to which litigants belonged has been given in all instances where this was indicated in the report of the case. Where a custom is peculiar to one or more tribes the tribal name has been given.

The Author desires to offer his thanks to Mr. A. H. Payn, attorney, of Cape Town, for his advice and help in the revision and arrangement of this work, and to Mr. R. B. Stevenson for reading through, and correcting, the manuscript.

W. M. SEYMOUR.

CAPE TOWN,

July, 1910.

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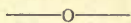
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ABBREVIATIONS.



For the sake of brevity, only one of the Proclamations, 110 of 1879, 112 of 1879, and 140 of 1885 has been referred to throughout this book. They are all similarly worded.

Other abbreviations used are:—

B.—Appeal Court, Butterworth.

F.—Appeal Court, Flagstaff.

K.—Appeal Court, Kokstad.

A.C.R.—Appeal Court Reports [Supreme Court.]

U.—Appeal Court, Umtata.

C.T.L.R.—*Cape Times* Law Reports.

E.D.C.—Eastern Districts Court.

E.G.—East Griqualand.

H.—Henkel's Native Appeal Courts Reports (1894-1909).

H.C.G.—High Court of Griqualand West.

J.—Juta's Supreme Court Reports.

S.C.—Supreme Court.

T. & T.—Tembuland and Transkei.

W.—Warner's Native Appeal Court Reports.

* Cases marked thus are reported at the end of this book.

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NATIVE LAWS AND CUSTOMS.

CHAPTER I.

MARRIAGE.

Part I.—*Classification and Effect in General.*

Marriages between natives may be divided into two classes, namely, those entered into before the date of annexation of the province of the Territories in which they were contracted, and those contracted after annexation.

Marriages before annexation were contracted in one of two ways, *viz.*, according to Native forms, or by Christian rites.

Regarding marriages contracted by Native forms (commonly known as "Native marriages" or "Marriages by Native custom") before annexation, Proclamations provide that all questions of divorce, issue, and property relative to them shall be tried according to Native laws in force at the time of their celebration.¹

The Supreme Court in 1892, in an appeal from Tembuland, held that Proc. 140 of 1885 was not retroactive, and that marriages, whether polygamous or not, contracted before annexation according to Native forms, were to be recognised by the Tembuland Courts.² The Court further held that the courts of law in the Colony proper would not recognise as valid any such marriage entered into by a man who had another wife living at the time; these latter courts,

1. Proc. 140 of 1885, Sec. 32.

2. Ngqobela *vs.* Sihele, J. 10, p. 346.

however, would recognise any marriages by unmarried natives entered into by Native forms before annexation.³

In another case it was held that a native could claim damages for adultery in a Magistrate's Court of the Transkei against a man who had had connection with a wife whom he (the husband) had polygamously married before annexation.⁴

In a later case it was held that polygamous marriages contracted according to Native forms in the Territories by a white man before annexation were legal, when such man had remained there all his life.⁵ The Court said that it did not express any opinion as to what its judgment would have been had the deceased white man removed with his wives to the Colony proper. As the children of this man were therefore legitimate, the succession duty, payable on the estate of their father coming to them, was reduced accordingly.^(A) The Court further stated that the Territories before annexation were in the position of a foreign country.

It will therefore be seen that marriages by Native forms before annexation, whether polygamous or not, may be considered legal by the courts of the Territories, but that such marriages contracted with a man who, although domiciled there at the time, already had another wife living, might not be recognised by the courts of the Colony proper, unless the contracting parties had remained in the Territories. Questions of divorce arising out of such marriages are dealt with under Native law.

Christian marriages entered into before annexation are legal. All questions of divorce relative to them are dealt with according to the law of the Colony proper.⁶ How these questions are dealt with before annexation is not known. The estates of such persons are dealt with under Native law.⁷

3. This ruling was confirmed in November *vs. Mapini*, J. 7, p. 3. (1892).

4. *Dantili vs. Mtirara*, J. 9, p. 455 (1892).

5. *Canham vs. The Master*, 19 C.T.R. 383 (1909).

6. Proc. 140 of 1885, Sec. 31.

7. *Vide* Chapter ix.

(A) *Addendum*.—Under Sec. 14 of Proc. 142 of 1910 any native (as defined in that Proclamation) who is the survivor of a Native marriage, whether such marriage be contracted before or after the date of that Proclamation, and any native, who is the issue of such a marriage, will be regarded, for the purpose of assessment of succession duty, as the legitimate spouse or legitimate descendant of the deceased spouse or parent, as the case may be.

It has not been directly decided as to whether a native man, having married by Christian rites before annexation, could then contract a second polygamous marriage by Native custom; but seeing that the annexing Proclamations are not retroactive, there appears to be no reason why he could not have done so.⁽⁸⁾

Moreover, it has been held that such a native could, after contracting a Christian marriage, reinstate a wife whom he had married by Native custom prior to his Christian marriage.⁸

The further question then arises whether a former marriage by Native forms is dissolved *ipso facto* by a subsequent Christian marriage. It has been decided that by contracting a Christian marriage prior to annexation a native "practically" divorced his other wives whom he sent home to their parents before the marriage took place; for, by his Christian marriage, he bound himself to keep one wife and one only.⁹

In another case it was held that a prior marriage by Native forms was not dissolved by reason of the husband contracting another marriage by Christian rites, where the first wife had remained on at his kraal, and no steps had been taken to effect a separation.¹⁰

It may be noted that the Transkei and East Griqualand were annexed in 1879, Tembuland in 1885, and Pondoland in 1894.^(c)

Marriages after annexation are either contracted by Native forms or under provisions of Proclamations (Proc. 140 of 1885, Sec. 30). This section reads as follows:—"Any marriage celebrated by any minister of the Christian religion, according to the rites of the same, or by any civil marriage officer,^(d) duly ap-

8. *Setlaboko vs. L. Setlaboko*, K. 1909; H., p. 275.

9. *Ibid.*

10. *Hlupeko vs. Masinkinya*, K., 1903.*

(B) See also Proc. 140 of 1885, Sec. 32 and Chapter iv., Part iv.

(C) Mount Aylyff and Rode Valley were annexed to Griqualand East in 1886 and 1887 respectively.

(D) *Addendum*.— By Subsecs. 1 and 3 of Sec. 7 of Proc. 142 of 1910, it will be unlawful and a criminal offence for a male native on or after November 8th, 1910, and during the subsistence of any marriage according to Native custom, to marry according to Colonial law, unless he shall first declare upon oath, before the magistrate (or assistant magistrate) of his district, the names of his native wife or wives, and their children, the amount of property that he may have allotted, under Native law, to each wife or house; and such other particulars as may be required of him. By Subsec. 2 of the above section no Christian minister, or civil marriage officer, may solemnise, on or after November 8th, 1910, a marriage of any male native unless he first shall have taken a declaration

pointed by the Governor to solemnise marriages, or according to Kafir or Fingo forms, provided such last-mentioned marriage shall be registered within three months from the date of such marriage in a book to be kept for that purpose by the Resident Magistrate of the district, shall be taken to be in all respects as valid and binding and have the same effect upon the parties to the same and their issue and property as a marriage contracted under the marriage laws of the Cape Colony.”^(E)

From this section it will be seen that Christian marriages, and marriages before civil marriage officers, after annexation, have the same effect on the persons contracting as if such marriages had been contracted in the Colony proper.^(F)

Regarding marriages by Native forms entered into in the Territories duly registered, this section places them on the same footing as Colonial marriages.

The Supreme Court held that the object of such registration was to give natives an opportunity of bringing first marriages, contracted in the usual Native forms, under Colonial law.¹¹

Registration would therefore have the effect of placing all

11. *Ngqobela vs. Sihele*, J. 10, p. 346 (1892).

from such native as to whether he has any wives by Native custom, and in the event of a native marriage subsisting the officiating minister or officer may not celebrate the proposed marriage, until a certificate be produced from a magistrate that the declaration required by Subsec. 1 has been duly made. By Subsec. 3 of the above section it will be a criminal offence for a native to make a false declaration in connection with a marriage before a magistrate, minister, or marriage officer.

(E) *Addendum*.—The legal effects of Sec. 30 *supra* will only apply to marriages contracted in the Territories on or after November 8th, 1910, in so far as that section is not repugnant to Proc. 142 of 1910. By Sec. 5 of the latter Proclamation no marriage between natives (as defined in that Proclamation) celebrated in the Territories on or after November 8th, 1910, will produce the legal consequences of community of property; however, provision will be made for parties to a marriage to be contracted under Colonial law, provided neither of them is then already married by Native forms, bringing their property into community (save immovables held under Proc. 227 of 1898) by making a declaration of their intention to do so before the magistrate of the district in which the marriage is to be solemnised within one month prior thereto.

(F) *Addendum*.—All questions arising out of such marriages, if contracted between natives to whom the provisions of Proc. 142 of 1910 will apply, will in future be dealt with under Colonial law (subject to Secs. 4 and 5 of that Proclamation) in the Court of the Chief Magistrate, or in any superior court having appellate jurisdiction over that Court.

other wives in the position of concubines; this being so, registration is now considered a dead letter in the Territories.¹²

As Section 30 (*supra*) provides that marriages contracted under Colonial law in the Territories have the same effect on the "persons" of the parties thereto as if such marriages had been contracted in the Colony proper, it is impossible for a "person," whether male or female, contracting such a marriage, to marry polygamously thereafter.^{13 (c)}

Regarding unregistered marriages contracted by Native forms after annexation, there is no statutory authority legalizing them. However, since Sec. 30 (*supra*) provides for their registration, there can be no doubt as to their recognition.

The Supreme Court held that such marriages between natives are legal, if not polygamous.¹⁴

The same Court said that Sec. 30 of Proc. 140 of 1885 directed that only first native marriages should be registered, and that it did not recognise the validity of subsequent marriages during the subsistence of the first; that, in the absence of such special recognition, the court was of opinion that such subsequent marriages could not be regarded as valid either by Colonial or by the Territorial courts.¹⁵

At the time these decisions were given, the Supreme Court and Eastern Districts Court had appellate jurisdiction over the Magistrates' Courts of the Territories in cases between natives.¹⁶ This jurisdiction has now been removed, and the only courts to which an appeal lies are the Chief Magistrates' Courts.¹⁷

It is therefore to the judgments of the latter courts that one must look to ascertain the present Native law in force in the Transkeian Territories. These judgments are final and binding, except where liable to disturbance on review.

12. *Lutseti vs. Ben*, U.W., p. 33.

13. *Matee vs. Njongwana*, K.H., p. 272. *Mnduze vs. Mdlimbi*, K., 1898; H. p. 27.

14. *November vs. Mapini*, 7 J., 3 (1892); *Ngqobela vs. Sihele* (*supra*).

15. *Ibid.*

16. Act 3 of 1885, Sec. 6.

17. See Chapter xv, Part ix.

(c) *Addendum*.—By Sec. 3, Proc. 142 of 1910, no marriage by Native custom, which takes place during the subsistence of any marriage contracted according to Colonial law, or of any registered Native marriage, will be recognised as conferring any status or rights under that Proclamation upon any party to such marriage by Native forms, or issue thereof.

The Chief Magistrates have never taken the same view as the Supreme Court regarding the validity of polygamous marriages contracted after annexation.

The Appeal Court at Umtata went fully into this question. Such marriages were held to be valid in law when contracted by natives according to native forms.¹⁸ The Chief Magistrate in his judgment said that there was no special statutory authority prohibiting such marriages; that Section 34 of Proc. 140 of 1885, on the contrary, recognised them, since it provided for the registration of the first of them. Therefore he came to the conclusion that such marriages were validly contracted.

In his reasons for judgment (for the case was taken on review to the Supreme Court) the Chief Magistrate stated that the Glen Grey Act, although not in force in the Territories, recognised such marriages,^(H) and that Sec. 45 of the said Proclamation also admitted that there were such marriages, since it provided for the taxation on huts of a man's numerous wives.¹⁹

Therefore, as the law now stands, polygamy is allowed amongst natives in the Territories when all the marriages are contracted by Native forms.

Where polygamous marriages are legal, a man may marry by Native forms the widow of his natural uncle, and may contract any marriage recognised by Native custom, provided such custom is not contrary to natural laws²⁰; but a native may not contract a marriage under Colonial law with a woman who has been brought into a prohibited degree of relationship by a previous Native marriage—for instance, the widow of his brother.²¹

Part II.—*Native Marriage: Parties to and Effects of.*

The ordinary marriage by Native forms is accomplished by the payment of dowry by the husband to the bride's father or guardian, followed either by the usual marriage celebrations and

18. *Lutseti vs. Ben, W.*, p. 33.

19. *Lutseti vs. Ben, C.T.R.* 7, p. 226, 1897.

20. *Rex vs. Mawabe, J.* 20, p. 647.

21. *Gqili vs. Siqangwe, B.* 1907; *H.* p. 155.

(H) Marriages by Native forms in the Glen Grey District are not recognised as legal, notwithstanding Secs. 19 and 24, Act 15 of 1894 and Act 14 of 1905; see *Nqeti vs. Mnete, E.D.C.*, 1909.

ceremonies performed by natives, or by the woman going to live with the man²² as his wife with her guardian's consent.

There are generally four persons who are interested in these marriages.

First, there is the father or guardian of the bride,^(j) who receives her dowry, and who is liable to return it should she not do her duty by her husband.

Secondly, there is the woman herself, who must be a willing party.²³ She cannot be forced into marriage against her will.²⁴ She has now the right to marry if over twenty-one years of age, since by Proclamation she then becomes a major.²⁵ Notwithstanding any Native custom to the contrary, a widow may, if she wishes, marry again by Native forms or customs.²⁶ A "dikazi" also has the right to marry.²⁷

It must be understood that the above authorities merely hold that a woman cannot be forced to marry against her will, and that any unmarried woman, being a major, has now the right to marry if she wishes. They do not affect the essentials to a Native marriage by custom.

Thirdly, there is the husband's father, who, in some tribes, assumes responsibility for the payment of dowry due on his son's marriage, and is very often the party who pays over the stock.

Fourthly, there is the husband, who is responsible for the payment of dowry, and who is entitled to recover it from his wife's guardian, should she desert him. Needless to say, he is never forced to marry.^(κ) His consent to the marriage is, however, essential.²⁸ The court refused to hold that marriage had been

22. *Mpakanyiswa vs. Ntshangase* (Fingos), K., 1897; H. p. 17.

23. Sec. 30 of Proc. 112 of 1879.

24. *Madonela vs. Lurwasi*, K., 1908.

25. Sec. 39 of Proc. 110 of 1879. *Rafu vs. Madolo*, B., 1908; H., p.

200.

26. *Mqobora vs. Meslani*, U., 1905; W., p. 35; H., p. 97. *Dobeni vs. Baka*, K., 1903; H., p. 58.

27. *Piki vs. Madi*, K., 1905; H., p. 95.

28. *Sofiko vs. Gova*, U., 1896; H. p. 7.

(j) A woman may be legally married from the kraal of her mother's people, more especially when her father has left her in their charge, or she has been brought up there (see *Mguzazwe vs. Betyeka*, U., 1908; H., p. 193).

(κ) Notwithstanding the fact that a man cannot be forced to marry, he is sometimes practically compelled to accept a wife whom he may never have seen before. It is not adverse to the custom of some tribes

consummated where a native had paid dowry for, and brought home, a girl whom he had arranged to be the wife of his absent son, who knew nothing of the matter. The dowry was ordered to be returned.²⁹

It is necessary for a man wishing to marry a woman to satisfy her guardian in the matter of her dowry, either by a full or part payment; otherwise the guardian will not hand over his ward, and the court will not order him to do so.³⁰

Should the guardian of a woman, after receiving dowry or a part payment on account, allow his ward to go to and live with her intended husband as his wife, the court has held that the parties are duly married, but if a lover, after paying a fine, for seduction, runs away with a girl against her guardian's consent, and lives with her under these circumstances, and refuses to give her up, no marriage has taken place.³¹ Likewise, after paying "bopo" (*i.e.*, a beast paid by an abductor who, although unable to pay dowry, wishes by the payment of a beast to bind the girl to him), a Pondo does not marry a girl by again getting possession of her and keeping her against the consent of her guardian.³²

The following decisions give examples of these unceremonial marriages:—

Three cattle were paid as dowry, and the woman thereupon lived with her husband for two years as his wife. (The husband contended that he had not married the woman.) *Held*, that this was sufficient under Native law to constitute a marriage.³³

Again, a woman had, under similar circumstances, lived "some months" with her husband. *Held*, that marriage had been consummated.³⁴

29. *Sofiko vs. Gova*, U., 1896; H., p. 7.

30. *Gqezi vs. Nzaye*, K., 1909; H., p. 271.

31. *Dondolo vs. Ncwati*, K., 1909.

32. *Nomdenge vs. Xontani* (Pondos), U., 1908; H. p. 186.

33. *Nobonjwa vs. Mbana*, K., 1904.

34. *Tobia vs. Mamosisi*, K., 1905.

for the father of an eligible girl to leave her at the kraal of some well-to-do neighbour as his wife; when this is done it is almost impossible to refuse to take the girl, as this would be looked upon as a deep insult, and would probably lead to bloodshed. In fact, it is considered tantamount to a declaration of war for one chief to refuse another chief's daughter when brought to him. However, the husband, although accepting the girl, will not generally pay a full dowry for her.

When a girl although never living
with a man gave birth to
a child. The man paid 2
beasts to guardian who accep-
ted them as damages. The
girl subsequently left guardian's
house & lived with her lover
for 3 months. Guardian made
no effort to recover her. Had
a marriage been consummated?

Again, a father accepted cattle, stipulating that they should count as part of dowry if the balance was duly forthcoming, but as a fine for seduction if no more was paid, and he allowed his daughter to live with her suitor. *Held*, that marriage had been effected.³⁵

Again, a man eloped with ("twala-ed") a woman, offered marriage, sent a beast to her guardian as dowry (and the guardian accepted it as such), and kept the woman as his wife. *Held*, that this constituted a marriage.³⁶ In this case the guardian contended there had been no marriage.

Again, there was a dispute as to whether the cattle paid were a fine or dowry. The Court said that the fact that the woman had had four children by the man who paid the cattle went far to show that a marriage had taken place, and it was consequently of opinion that marriage had been consummated.³⁷

In another case dowry had been partly paid, and the woman had lived as the payer's wife for one month. *Held*, that marriage had been effected.³⁸

The principle that marriage takes place when payment of dowry is coupled with cohabitation at the husband's kraal applies equally in the case where the woman taken there is a widow.³⁹

A marriage by Native forms may be validly contracted although no dowry is paid,⁴⁰ but it is essential that the customary marriage ceremonies be gone through: the court will not uphold an intercourse between a man and woman as being a marriage where no dowry is paid and no ceremony performed, even though the intercourse takes place with the woman's guardian's consent.⁴¹

Natives may not contract marriages according to Kafir forms in the Colony itself; such marriages are not recognised as legal.⁴² The children born of them are illegitimate.⁴³

However, when marriage by native custom is contracted in the Colony, and the parties thereafter settle in the Territories as

35. *Mzanduli vs. Bukwana*, K., 1903.*

36. *Oliver vs. Ndamani*, K., 1908. See also *Qakamfana vs. Nkolonzi* U., 1905; H. p. 102.

37. *Geba vs. Dokolwana*, K., 1906.

38. *Tsheki vs. Sodeli*, K., 1906.*

39. *Mabengo vs. Nguqu*, K., 1905.

40. *Mkohlwa vs. Mangaliso* (Pondos); U., 1908; H. p. 202.

41. *Maxayi vs. Tukani* (Pondos) U., 1905; H. p. 99.

42. *Jokwana vs. Makobaba*, E.D.C., 2, p. 14. *Flara Silo vs. Mdlayi*, U., 1903; H., p. 64.

43. *Koytyo vs. Sibani*, E.D.C. 7, p. 187.

man and wife, they are considered as legally married, and their children are legitimate.⁴⁴

Part III.—*Second and Subsequent Marriages of Women.*^(L)

It is necessary, in order to deal with the validity of second marriages of women, to describe shortly what is considered in some cases—hitherto uncertain—to constitute a dissolution of the first marriage; for if the first marriage is still in existence, a second marriage with the woman previously married is void, for no woman can marry more than one husband at a time, although a husband may marry more than one wife.

It is the general Native law that when a woman has been “thrown away” or driven back to her own people by her husband with the intention of permanently divorcing her, marriage is thereupon dissolved.⁴⁵ The children born of the woman thereafter do not belong to her former husband, and she is legally freed from all marriage ties.⁴⁶

It is customary for a marriage to be considered dissolved where the husband and wife have separated and the dowry has been returned by the woman’s guardian.⁴⁷ Such woman may therefore marry again.

Amongst natives residing in the Territories outside East Griqualand it is law that, where a woman has without cause deserted her husband, she cannot marry again by Native custom (unless the dowry paid for her has been returned to her husband, or marriage has been dissolved by order of Court).⁴⁸ Thus any second marriage by Native forms entered into by her would be void, even if her second husband was unaware of any previous nuptials.⁴⁹

44. *Jeke vs. Judge*, J. 11, p. 125 (1894). *Rasmeli vs. Plaatje*, U., 1899; H., p. 30. *Tala vs. Matobane*, K., 1907; H., p. 149.

45. *Mbono vs. Sifuba*, K., 1907; H. p. 137.

46. *Maxobongwana vs. Funda*, K., 1909; H., p. 273. *Mzambalala vs. Silinga*, B., 1901; W., p. 7; H. p. 40.

47. *Mgenaka vs. Mditshwa* (Tembus), U., 1906; W., p. 30; H., p. 105. *Mesana vs. Ntshanga*, U. 1897; W., p. 32; H., p. 16. *Pohloana vs. Ngqibelo*, K., 1906.*

48. *Mesana vs. Ntshanga*, U., 1897; W., p. 32; H., p. 16.

49. *Mgenaka vs. Mditshwa* (Tembus), U., 1906; W., p. 30; H., p. 105; *Gqamse vs. Stemele*, U., 1906; H., p. 113

(L) See also Chapter iv where this subject is dealt with.

As to whether a native wife can contract a second marriage under Colonial law the reader is referred to Chapter IV.

But the law existing amongst the tribes in East Griqualand, and enforced by the courts of that province, is that when a wife leaves her husband with the intention of never returning, and she does not go back to him, marriage is dissolved from the day on which she left him. Thus a second man may come forward and marry her, even though the dowry paid by her first husband has not been returned.^{(M)50}

It will therefore be seen that many marriages have been declared legitimate in East Griqualand which, if contracted in other parts of the Territories, would have been declared void.

Further, the natives of East Griqualand, knowing of this law and of the decisions of their Appeal Court, have contracted similar marriages, which, it follows, cannot now be considered as invalid in any province of the Territories.

It must be borne in mind that some women during their husband's absence live with other men, who have no intention of ever marrying them, and who are liable for an action for damages for adultery on the husband's returning home.

Second dowries are invariably paid to a divorced woman's own people, and not to her first husband's; and where a woman wishes to marry again it is customary amongst all natives for her to return home to do so.

However, there appears to be one case in which a woman's second husband paid dowry to the first husband himself in the presence of her father.⁵¹

As before pointed out, a widow now has the right to marry.

It is the practice amongst all natives for a widow wishing to re-marry to return home to her own people to do so. She is never given in marriage by her late husband's relatives. She

50. This principle was upheld in the following cases:— *Juleka vs. Sihlahle*, 1905, H., p. 88; *Mociti vs. Nthako*, 1906;* *Nodange vs. Gcwave*, 1905; *Pata vs. Mshiywa*, 1906;* *Xabanisa vs. Dwayi*, 1906; all of the Appeal Court, Kokstad, and the case of *Mtuyedwa vs. Tshisa*, H., p. 122, heard at Flagstaff in 1906.

51. *Pata vs. Mshiywa*, K., 1906.*

(M) See note on page 54.

may marry again by Native custom, even though the first dowry paid for her has not been returned.⁵²

Thus, when a dispute arose as to whether certain cattle, paid in connection with an alleged marriage with a widow, were a fine for adultery or her dowry, it was held that the stock was a fine, since it was given to the late husband's people.⁵³

Conversely, where cattle in a similar case had been paid to the widow's relatives, it was held that the stock was dowry.⁵⁴

In one exceptional case, however, it appears that dowry was paid to the deceased husband's people on a widow's marriage: the Court, while holding that the cattle were dowry, said that as the heir to the woman's first husband had received them as dowry, he had no claim against the woman's guardian for the return of the dowry paid on her first marriage.⁵⁵

Part IV.—*Marriage Ceremonies (Basuto, Hlubi and Hlangweni).*

Basuto Custom.—The Basutos have one marriage feast, which is held at the kraal of the bride's people, usually when dowry is paid, or when the balance to complete the number of stock required before the woman is allowed to go to her future husband's kraal is forthcoming.

After the feast, at which the bridegroom, if the woman is his first wife, is never present, his people return home, and then the women of her kraal, and usually one man, take the girl over to her husband's kraal as his wife. The women at this stage ask for the "nqobo" beast. The man simply accompanies them to look after their interests. Sometimes a couple of years will elapse between the feast and the final handing over of the woman at her husband's kraal.

Hlubi Custom.—The Hlubis have two marriage feasts. When the bridegroom's people pay the dowry, a beast is killed at the kraal of the bride's people as a welcome. After that, a day is fixed on which the bride is to go to her intended husband's kraal as his wife. On the appointed day there is a big feast furnished by the bridegroom's people, which concludes the marriage.

Hlangweni Custom.—Amongst the Hlangwenis, the marriage ceremony takes place only when the bridegroom is able to

52. *Vide* Chapter v.

53. *Dobení vs. Baka*, K., 1903; H., p. 58.

54. *Mapura vs. Aulia*, K., 1906.

55. *Madevane vs. Kuma*, K., 1907; H., p. 150.

pay full dowry before marriage; in other cases the bridegroom pays what dowry he can, and the woman is "lent" to him, an unceremonial marriage thus being effected.

The Hlangweni marriage ceremony is held at the kraal of the bridegroom's people, to which, on an appointed day, the bride is conducted by the people of her kraal, who take with them certain animals and gifts, known as "paka,"⁵⁶ to be distributed amongst the bridegroom's relations.

The celebrations proper, at which small stock is slaughtered by the bridegroom's people, take place on the day after the arrival of the bridal party, who are given huts apart from those occupied by the regular inhabitants of the kraal. These celebrations consist of the usual dancing, speech-making and feasting.

On the following day the bride's people return home, leaving their daughter installed in her new surroundings; a few girls, however, remain behind to attend to the bride, also a few young men, who wait until the female beast, called the "undondolo" (staff), is slaughtered and eaten.

Tembus, Fingos and Pondomisi.—Amongst the Tembus, Fingos and Pondomisi the marriage ceremony takes place at the bridegroom's kraal. The marriage party, when accompanying the bride to her future husband's kraal, after her dowry has been received, take a beast for slaughter along with them.

⁵⁶. As to what this "paka" usually consists of, see Chapter xv, Part xx.

CHAPTER II.

PRELIMINARIES TO MARRIAGE; BREACH OF CONTRACT;
EARNEST CATTLE.Part I.—*Preliminaries to Marriage: Payment of Earnest
Cattle and Fines.*

A native chooses his own wife, although influence may be brought to bear upon him by his father or guardian, more especially in regard to his first wife.

It is customary amongst some tribes for negotiations to come from the woman's people, who take their daughters under the "ukugana" custom to the kraals of eligible and selected men in the hope of marriages being arranged.¹

Having chosen his wife, the intended bridegroom in some instances carries her away, or elopes^(A) with her, to his people's kraal, where he not unusually seduces her;^(B) she is then followed up by her own people, and returned to them with a certain number of cattle. Sometimes one beast is given, and sometimes more.² One of these cattle is named a "reporting beast"³ or "elopement beast" ("nkata beast"). The woman's guardian is thereupon approached, and his consent obtained to a marriage. The cattle are kept by him as an advance payment of the dowry he is to receive on the marriage, and as an earnest that marriage is intended.⁴

1. J. C. Warner's notes in MacLean's Compendium, p. 71. Nqwala *vs.* Sutiko (Bacas), K., 1909; H., p. 232.

2. Kakana *vs.* Qorane (Hlubis), K., 1905; H. p. 94. Dodo *vs.* Maqaiya, U. 1898; H. p. 23. Ntwapantsi *vs.* Mazeka, K., 1905.*

3. Ntwapantsi *vs.* Mazeka, K., 1905.*

4. Kakana *vs.* Qorane (Hlubis), K., 1905; H., p. 94.

(A) Notwithstanding Native custom, abduction is a crime in the Native Territories under Sec. 269 of the Penal Code (Rex *vs.* Njovo, 1906, E.D.C., p. 71; Ncedani *vs.* Rex, 1908, E.D.C., p. 243).

(B) Small stock is generally slaughtered to welcome the abducted woman on her arrival at the Kraal of her future husband's people.

This custom of "twala," as it is called, is practised by the Hlangwenis,⁵ Pondos,⁶ and other tribes in the Native Territories.

There are instances where a man carries off ("twalas") a woman, but where he and his people are unable to pay dowry. In such cases the woman is returned to her father with a "beast" (a horse, cow, or such-like), which is paid as an apology for the action.⁷ Under such circumstances the "elopement beast," or "reporting beast,"^(c) as it is sometimes called, can be claimed in law, for the woman's father or guardian is entitled to it as damages. Further, he will generally insist upon its payment before he will discuss any negotiations for a marriage; but the fine cannot be claimed in the courts when marriage is agreed upon and negotiations are going on, for, while this is happening, any action for a fine for elopement must be left in abeyance.⁸

Amongst the Pondos it is customary for a man who has eloped with a woman, and finds himself unable to pay dowry, to pay a beast (called "bopo") in order to bind her to him in the meanwhile.⁹

Sometimes negotiations are broken off at a later stage by the intended husband, in which case he loses the right to reclaim the beast paid as damages for "twala."¹⁰

If the woman is deflowered or made pregnant during the elopement or engagement to marry, her guardian generally makes further calls upon her intended husband to pay more stock to cover the additional damage sustained.

In all these cases, when marriage takes place, fines paid are reckoned as forming part of the dowry, and not as damages in addition to it.¹¹

5. Mzamdule *vs.* Bukwane, K., 1903.*

6. Nomdenge *vs.* Xontani, U., 1908; H., p. 186.

7. Kakana *vs.* Qorane (Hlubis), K., 1905; H., p. 94.

8. Mbambela *vs.* Mes, K., 1901.*

9. Nomdenge *vs.* Xontani, U., 1908; H., p. 186.

10. Kakana *vs.* Qorane (Hlubis) K. 1905, H. p. 94.

11. Ntwapantsi *vs.* Mazeka, K., 1905.* Gxonono *vs.* Skuni, F., 1907; H., p. 154. Pumlomo *vs.* Mbusi (Gcalekas), B., 1908; H., p. 179. Ngwaleni *vs.* Lingezeweni, K., 1905.*

(c) This animal is not claimable amongst some tribes, (including the Pondos). See Ramba *vs.* Dwe (U. 1907; H., p. 161), where the Court remarked: "According to Native custom, no damages are awarded for ordinary abduction where the girl is returned intact." But see Pumlomo *vs.* Mbusi (B. 1908; H., p. 179), and Mpakanyiswa *vs.* Ntshangase (Fingos) (K., 1897; H. p. 17).

However, to this rule there are two exceptions. The fine for abduction against Fingos,¹² and the "nqutu" and "ngobo" beasts,¹³ never merge into dowry.

Sometimes no elopement takes place, but after the proposed marriage is arranged the intended bride is taken to the kraal of her intended husband's people and deflowered there, after which she is returned to her father.¹⁴ This action does not constitute an elopement, and in such a case, on marriage falling through, the claim against the intended husband is merely one for damages for deflowering the woman (if no pregnancy follows), for which one head of horned cattle (or a horse) is claimable.¹⁵

This mode of carrying off is usually done by the friends of the intended husband.¹⁶

However, it is not customary to adopt this procedure when a Christian marriage is agreed upon.¹⁷

It is also the custom amongst the Bacas and Pondomisi tribes for an eligible woman to be taken by her people to the kraal of a man with a view to her marrying him eventually. Sometimes dowry is advanced in anticipation of marriage. Should the woman refuse to marry, or negotiations not come to a head, the dowry cattle are returned, along with their increase (if any).¹⁸

Should negotiations be successful, the woman is formally handed to the man as his wife, full dowry being then payable. Until this done, the woman is not his wife.¹⁹

It is not uncommon amongst the Tembus, even after a girl has been asked for in marriage, to send her to the kraal of the man with whom marriage is contemplated, where she remains unmolested until dowry, or a portion thereof, is paid. If no agreement is come to, she is returned to her guardian's kraal in the same condition as when she left it; if she is accepted, dowry is paid and the marriage consummated; but until this latter event happens she is not considered the wife of the man to whom she was sent.²⁰

12. Pumlomo *vs.* Mbusi, B., 1908; H., p. 179.

13. See Chapter viii.

14. Manyela *vs.* Yakumina, K., 1903. *

15. *Ibid.*

16. Mapukata *vs.* Boke, K., 1908.

17. *Ibid.*

18. Nqwala *vs.* Sutiko (Bacas), K., 1909; H., p. 234.

19. *Ibid.*

20. Mlungisi *vs.* Dlayedwa (Tembus), U., 1901; H., p. 44.

17. This is not the case amongst Vakarans or
 Lake. - Earnest Cattle are the property
 of 4-in-law who can dispose of them
 as he pleases. If any of the advance 1000 dies
 when paid over to 4-in-law, 8-in-law
 is not required to replace death.
 Advance 1000 cannot be attached
 for debt of 8-in-law. Can be for
 debt of 4-in-law.
 If marriage does not interest 8-in-law
 must return all earnest cattle
 with interest. - If he has disposed
 of them 8-in-law cannot claim
 from where they have gone must
 claim on 4-in-law. No

↓
 This applies to Vazozuru custom
 too No

Part II.—*Ownership and Lien: Earnest Cattle.*

The advance of dowry by an intended husband to the guardian of his prospective bride remains the property of the payer,²¹ who is liable for any natural loss occurring to it.²² Consequently, if the intended marriage falls through, he is entitled to the return of the actual cattle paid,²³ and also to any increase of the stock.²⁴ Such progeny is usually reckoned as further stock paid on account of the dowry due. If any earnest cattle die, the intended husband has to supply others in their place.²⁵

The ownership never leaves the payer until marriage takes place,²⁶ and, as the stock is merely paid as earnest of the intended marriage,²⁷ the receiver cannot sell or in any way dispose of it;²⁸ but he cannot charge for herding, as he has the use of the stock.

Earnest cattle cannot be attached for the receiver's debts to third parties, and, if they are seized, the payer, or someone on his behalf, may interplead for them.²⁹

On the other hand, such stock cannot be attached by the creditors of the payee,³⁰ even though the cattle are the second dowry received for the woman, and her first dowry has not been returned (provided the first marriage has been dissolved);³¹ this is so because the receiver has a real right (lien) in the property. Thus, while the engagement to marry still exists, the dowry paid on account cannot be attached by the creditors of the woman's guardian or of her intended husband.

Although the loss of any earnest cattle is borne by the payer, still it is apparently necessary that their death must be at

21. *Baduli vs. Main*, B.W., p. 9.

22. *Ibid.*

23. *Mali vs. Busakwe*, B., 1908; H., p. 177.

24. *Marizene vs. Stepula*, K., 1906. *Nqwala vs. Sutiko*, K., 1909; H., p. 232.

25. *Baduli vs. Main*, B.W., p. 9. The decision in *Ndatambi vs. Ntozake* in 1895, U., H., p. 3, is therefore overruled.

26. *Baduli vs. Main*, B.W., p. 9. *Love vs. Futela*, C.T.R. 16, p. 251 (1906).

27. *Kakana vs. Qorane*, K., 1905; H., p. 94.

28. *Baduli vs. Main*, B.W., p. 9. *Love vs. Futela*, C.T.R. 16, p. 251 (1906).

29. *Mhlahlalwa vs. Mkovonkovo*, K., 1905.

30. *Xabanisa vs. Dwayi*, K., 1906. *Mills vs. Bidli*, C.T.R. 15, p. 742 (1905).

31. *Xabanisa vs. Dwayi*, *supra*.

once reported to him or to the people of his kraal, to allow of investigation; otherwise the woman's guardian will be liable.³²

When dowry stock has been paid over, and has been sold or otherwise made away with by the woman's guardian, before marriage, the intended husband can recover the original stock from third parties in possession.³³

It has been held that the payer, where no marriage has been consummated, has no claim to the increase of his dowry stock in the hands of third parties,³⁴ and, further, that he has only a personal action against his intended father-in-law for such increase as may have accrued before the original stock left his (the father-in-law's) kraal.^(D) ³⁵

Part III.—*Termination of Contracts to Marry: Earnest Cattle and Fines.*

Marriages although arranged do not always take place. Sometimes the engagement or contract to marry is broken off by the intended husband, sometimes by the woman or her people, and in other cases by mutual consent.

The position of the earnest cattle is governed by the circumstances surrounding the breaking off of the engagement, and the rules and decisions relating thereto are set forth hereunder.

When neither party is at fault in breaking the contract to marry,³⁶ or when either of the contracting parties dies,³⁷ or when the engagement is terminated by mutual consent,³⁸ all the earnest cattle must be returned to the intended husband. The increase of such stock must also be handed back with them.³⁹

In the same way, all dowry and increase have to be returned when the woman or her guardian breaks off the engagement,⁴⁰ or if, after receiving the earnest cattle, the guardian

32. Ngwaleni *vs.* Lingezwani, K., 1905.*

33. Baduli *vs.* Main, B.W., p. 9. Peacock *vs.* Ben Rango, J. 19, p. 322.

34. Nontangana *vs.* Manyosi, K., 1904.

35. *Ibid.*

36. Nkonto *vs.* Mayenje, K., 1907.

37. Malusi *vs.* Dandi, U. 1908; H., p. 169. Manzeni *vs.* Stepula, K., 1906. Dlamalala *vs.* Sigaqana, K., 1903.

38. Kolman *vs.* Utlaka, K., 1906.

39. Manzeni *vs.* Stepula, K., 1906. Dlamalala *vs.* Sigaqana, K., 1903.

40. Lande *vs.* Qangule, K., 1903. Mlahliwe *vs.* Gobozana, B.W., p. 10.

(D) This decision seems to be in conflict with the generally accepted principles of ownership as laid down in other decisions.

claims too large a number of stock as dowry.⁴¹ In the last case the Court did not allow the woman's father to claim an elopement beast, although the judgment shewed there was an elopement.

When the intended wife dies, it is sometimes arranged between all parties concerned that a sister shall take her place, and the return of the dowry deposit is thus avoided.⁴²

The guardian of the intended bride, before returning the earnest cattle, has the right to deduct any damages, by way of fines, due to him for the defloration or pregnancy of his ward caused by her intended husband,⁴³ but he is not entitled to retain a beast as a fine for elopement where the intended bridegroom is not the defaulting party, notwithstanding that a Christian marriage may have been agreed upon after the elopement.⁴⁴ On the other hand, if the intended husband or his people break off the engagement, such elopement beast may be claimed.⁴⁵

However, the guardian must not deduct too large a number of stock for fines owing to him, neither should the intended husband, in suing for return of his earnest cattle, fail to allow the guardian the cattle due to him, otherwise they may not get their costs,⁴⁶ because the granting or withholding of costs is a matter of discretion, and need not necessarily be governed by strict rules of tender.

If the woman dies before marriage, but after having been made pregnant by her intended husband, her guardian may deduct a fine from the earnest cattle on hand for the seduction,⁴⁷ provided her condition is reported to the seducer prior to her demise.^(E) In the first case quoted the guardian was allowed to retain two cattle and six goats. In the second case the fine was fixed at three head of cattle.

In the same way, the death of the intended bridegroom, even before notification of pregnancy has been given, does not debar

41. *Moki vs. Mpangwa*, K., 1906.*

42. *Mkatulela vs. Lucuku*, K., 1907.*

43. *Mqutshwa vs. Mgqagwana*, K., 1903. *Dodo vs. Maqaiya*, U., 1898; H., p. 23. *Maqenga vs. Jiji*, K., 1904. *Nkonto vs. Mayenje*, K., 1907. *Moki vs. Mpangwa*, K., 1906.*

44. *Moki vs. Mpangwa*, K., 1906.* *Nonjiko vs. Ndleleni*, K., 1906.

45. *Makasi vs. Rarabi*, K., 1904.

46. *Maqenga vs. Jiji*, K., 1904.

47. *Bavu vs. Mpofana*, K., 1905.* *Mfayize vs. Mqukuse*, B., 1906; H., p. 127.

(E) See Chapter viii, Part iii.

the intended wife's guardian from claiming damages under Native law. However, the fact that the deceased man was not notified would be a strong feature in determining whether he really caused the pregnancy.⁴⁸

On reading the report of the case of *Bavu vs. Mpofana* (*supra*), it will be seen that probably, had it been proved that the woman's death occurred in childbirth, the intended husband would not have been allowed to claim back any of the earnest cattle; especially when it is remembered that death from childbirth after marriage is attributed to the husband, who, in consequence, is not entitled to the return of dowry.⁴⁹

Should the earnest deposit not be sufficient to cover the fines due, when the engagement is broken off, the woman's guardian may sue for the balance he considers due to him. In such cases he sometimes makes an alternative claim for the balance of dowry, tendering the woman in the hope that the marriage may yet be brought about.⁵⁰

The measure of damages for which a seducer is liable will be found discussed in the Chapter on Seduction

It is the duty of the woman's guardian to return the advance of dowry when it is due, as, for instance, where a second dowry is received by him for the same girl; if he fails to do so, he is liable for any loss by death of the cattle after their return has been demanded.⁵¹

Actions arising out of breach of contract to marry, wherein earnest cattle are in dispute, are practically always brought between the woman's guardian and her intended husband. Under Native law there is no specific action for damages for breach of promise. Such damages are arranged for when the repayment of dowry is under consideration. The principles governing this matter under Native law are, briefly, that, should the intended bridegroom break off the proposed marriage, he is not entitled to recover his earnest cattle;⁵² but otherwise he is.

However, there is nothing in Native or Colonial law to prevent the injured woman herself (duly assisted by her guardian), from instituting an action for damages for breach of contract and seduction; and in such a case the most defendant

48. *Malusi vs. Dandi*, U., 1908; H., p. 169.

49. See Chapter iii, Part xii.

50. *Mafunda vs. Mlenzana*, K., 1904.

51. *Nomayayi vs. Soldam*, K., 1902.

52. *Gwayi vs. Gwija*, B., 1909; H., p. 235.

can urge is that any dowry deposit should be taken into consideration and set off against the damages.⁵³

In one case⁵⁴ a woman sued for £50 for breach of contract, £50 damages for her seduction, and £20 lying-in expenses. It is not stated under what rites the marriage was to have been celebrated. The President held that as the parties to the suit were natives, Native law should be applied. Judgment was given for five cattle at £6 10s. each as damages for seduction. The defendant's conduct was taken into consideration in fixing the fine.

In another case⁵⁵ the plaintiff sued for £50 for breach of contract and seduction. The marriage was to have taken place under Christian rites. The Appeal Court sent the case back to be tried on its merits according to Colonial law.

A man cannot be compelled to marry the woman he is in treaty for, and according to custom he is entitled to the return of his earnest cattle if he breaks off the engagement for good reason.

Thus, in one case⁵⁶ where the intended bride went visiting in Pondoland, after having undertaken not to do so without her intended husband's consent, it was held that he was justified in breaking off the engagement, and entitled to his dowry deposit.

If the engagement is broken off through the fault of the intended husband, it depends upon the degree of blame in each case as to how much of the earnest stock he may recover back; for it is clear from the case of *Mlahliwa vs. Goboza* (B.W., p. 10), that it does not necessarily follow that, because the prospective bridegroom is not true to his intended bride, he should lose all his stock.⁵⁷

The following decisions illustrate the principles laid down above:

The Supreme Court held⁵⁸ that, if the intended bridegroom breaks off the engagement, he loses his dowry deposit. The

53. *Gwayi* (duly assisted by her guardian) *vs.* *Gwija*, B., 1909; H., p. 235.

54. *Mdlozini* (assisted by *Magaqa*) *vs.* *Magaqa*, K., 1906.

55. *Gwayi* (duly assisted by her guardian) *vs.* *Gwija*, B., 1909; H., p. 235.

56. *Kakana vs. Nolutshunga*, K., 1902.

57. *Mkokose vs. Sifaniso*, K., 1906.

58. *Nombombo vs. Stofele*, 12 C.T.R., p. 596.

Appeal Court at Butterworth⁵⁹ held that, in addition to this, he loses his right to claim back any excessive fines paid by him over and above the dowry, for the seduction of his would-be bride.

In another case the Court refused to allow a native to claim back any of the dowry deposit, where he broke off the engagement owing to his having had connection with another woman.⁶⁰ Probably he had incurred fresh liability, and thus was obliged to give up the idea of marriage.

Again, where an intended husband, owing to bodily infirmity (impotency), was unable to marry, he was awarded four cattle and sixteen sheep out of a dowry deposit of five cattle and sixteen sheep.⁶¹ The Court allowed the woman's guardian one beast because he had been put to certain expenses.

Again, where the man forcibly carried off the girl he was in treaty for and took her over a large extent of country, during which time he forcibly seduced her, the Court held that her father, who had stipulated that the marriage was to have been by Christian rites, was justified in breaking off the engagement and retaining the seven cattle he had received on account of dowry.⁶²

If the woman insists on getting married according to Christian rites after agreeing to marry according to Native custom, it is clear from the case of *Ncapayi vs. Mbulelo* (K., 1902) that her intended husband would be justified in breaking off the engagement.

Immorality on the part of the intended husband is not a sufficient cause for the woman's people breaking off an engagement and retaining the dowry deposit, even though a Christian marriage was agreed upon.⁶³

Should a native, after paying dowry, discover that his prospective father-in-law is collecting other dowries for the woman to whom he is engaged, he may break off the engagement and claim back his stock if he had agreed to be married according to Christian rites.⁶⁴ As dowry disputes are tried

59. *Joli vs. Nduniso* (Fingos), B., 1907; H., p. 141.

60. *Nojiwa vs. Vuba*, B., 1903; W., p. 15; H., p. 57. *Magadla vs. Gowebe*, K., 1909.

61. *Yapi Tole vs. Ngazi*, U., 1903; W., p. 2; H., p. 61.

62. *Mapukata vs. Boke*, K., 1908.

63. *Fetana vs. Sinukela*, U., 1897; H., p. 22.

64. *Mali vs. Busakwe*, B., 1908; H., p. 177.

under Native law irrespective of the form of marriage, it may fairly be inferred that a similar decision would be given if a Native marriage had been arranged.

A guardian is never liable to return to his ward's intended husband any stock the latter may have slaughtered in connection with the engagement.⁶⁵

⁶⁵ Ndungulwana vs. Mhlope, K., 1903. Mqutshwa vs. Mngqaqwana, K., 1903.

CHAPTER III.

DOWRY.

Part I.—*Dowry: Its Nature and Objects.*

As previously explained, when a man marries according to Native custom, he pays over to his wife's guardian a certain amount of live-stock, valuables,¹ or money,² known as dowry.

One object of dowry is to secure proper treatment of the woman by her husband, for, if he grossly maltreats her, she may return to her guardian, in which case her husband may claim back neither the stock nor his wife.³

Another object of dowry is to provide maintenance for the woman⁴ should she be compelled to return to her people through her husband's misconduct towards her; for in such a case her guardian would be bound to support her.⁵ He cannot claim to be further reimbursed by her husband for doing so,⁶ even though the marriage may have taken place under Colonial law.⁷

Dowry has a third use, for, should a wife leave her husband without sufficient cause, he may claim back the dowry from her guardian, who, rather than disgorge it, will do his utmost to bring about a reconciliation.⁸

Morally, therefore, the effect of dowry is good. Dowry is not, as is sometimes supposed, the purchase price paid by a native for his wife. Were dowry merely the purchase price

1. See *Tiloko vs. Simanga*, U., 1902; H., p. 51, where a saddle was paid.

2. See *Piki vs. Madi*, K., 1905; H., p. 95, where £10 was paid.

3. *Kele vs. Ketj*, U., 1908; H., p. 171. The reader will notice that judgment was given in this case in terms of a tender. *Conana vs. Dungulu*, U., 1907; H., p. 135. *Mbono vs. Manoxweni*, — 6 E.D.C., p. 62 (1891).

4. *Bunge vs. Ndlanya*, K., 1907; H. p. 153.

5. *Mbono vs. Manoxweni*, *supra*. *Ngqobela vs. Sihéle*, J. 10, p. 346.

6. *Ngxabisa vs. Ngcobitsha*, B., 1900; H., p. 30.

7. *Ibid*.

8. *Mbono vs. Manoxweni*, *supra*.

of future cohabitation with a woman, it would be a consideration given for an immoral purpose, and the husband would never be able to reclaim it.⁹

The following definition of the contract of "ukulobolo" (or dowry) was adopted by the Eastern Districts Court:—¹⁰

"'Ukulobolo' is a contract between the father and the intended husband of his daughter, by which the father promises his consent to the marriage of his daughter, and to protect her in case of necessity either during or after marriage, and by which in return he obtains from the husband valuable consideration, usually 'ikazi' (dowry stock), partly for such consent, and partly as a guarantee by the husband of his good conduct towards his wife."

The court remarked that dowry was paid to prevent desertion by the wife, for her guardian would have to return the stock if she were to leave without cause, and, further, that this latter condition, attached to the payment of dowry, was also necessary to protect the husband against collusion of his wife with her father to cheat him out of his cattle.

Any agreement, which would reduce the payment of dowry and Native marriage to a purchase and sale, and would do away with the objects for which dowry is paid, will not be upheld by the Courts. Thus, in a case where a written agreement stipulated that the husband's father should unconditionally pay a balance of dowry due for his son's wife, and where, before the father had done so and shortly after marriage, the bride had died (which event, according to custom, debarred the woman's guardian from claiming any further dowry), the Court refused to enforce the agreement.¹¹

Part II.—*Contracts to Pay Dowry; Effects of Marriage under Colonial Law thereupon.*

Whether the Courts will enforce agreements to pay dowry entered into prior to a Christian or other marriage contracted under Colonial law depends upon whether they elect to try the suits under Colonial law or Native custom.

There is no direct decision by the Courts of the Colony proper to indicate whether a dowry contract preceding a valid

9. Mbono *vs.* Manoxweni, *supra*.

10. *Ibid.*

11. Bunge *vs.* Ndlanya, K., 1907; H., p. 153.

marriage in the Colony would be enforced there. The Courts of the Territories have held that verbal contracts to pay dowry made before Christian marriages cannot be recognised and enforced under Colonial law;¹² further, they have held that such contracts between natives of tribes practising "teleka" are to be dealt with according to that law.¹³ Natives following the customs of the Basutos may sue for dowry, and it has yet to be decided which law will be applied to their cases.

Needless to say, no action lies where no contract to pay dowry is made, and a marriage by Christian rites is entered into.¹⁴

Regarding contracts to pay dowry made after the consummation of Christian marriages, it has been held that they may, if in writing, be validly enforced in law, even amongst tribes which "teleka";¹⁵ but that such contracts cannot be enforced by "teleka."¹⁶

The above decisions apply also in the cases of Native registered marriages, and marriages before Civil marriage officers, since Proclamations¹⁷ provide that these have the same legal effect upon the parties contracting them as Christian marriages.

There is much to be said in favour of the contention that an antenuptial dowry contract preceding a legal marriage in the Colony proper might be enforced there. A dowry contract is certainly analogous to the antenuptial contract now of general adoption throughout South Africa.

The case of *Malgas vs. Gakavu* (E.D.C. 6, p. 225) did not decide more than that dowry paid in the Colony proper for a woman, who, on the strength of such payment, had been allowed by her guardian to cohabit with the native paying it without being first legally married to him in accordance with Colonial law, amounted to a consideration given for future immoral cohabitation. In its judgment the Court said regretfully that it was unable to find otherwise, for, since no legal marriage had

12. *Adonis vs. Zazini*, B., 1901; W., p. 9; H., p. 46. *Manqana vs. Ntintile*, K., 1908; H., p. 218.

13. *Manqana vs. Ntintile*, K., 1908; H., p. 218. *Sihuhu vs. Ntshaba*, U., 1903; H., p. 62.

14. See Part iv of this Chapter. *Moerane vs. Phakane*, K., 1908; H., p. 221.

15. *Sihuhu vs. Ntshaba*, U., 1903; H., p. 62.

16. *Ibid.*

17. Proc. 110 of 1879, Sec. 31.

been performed, it had no alternative, notwithstanding the admitted benefits attaching to "lobolo" contracts amongst natives.

If the contract to pay dowry in this instance had been coupled with a valid marriage, there can be no doubt that the consideration for which dowry would then have been paid could not have been "future immoral cohabitation"; and in the face of the definition of a dowry contract, adopted in the case of *Mbono vs. Manoxweni* (*supra*), dowry accompanied, or to be accompanied, by a valid marriage is certainly not given for any immoral purpose, but is a marriage settlement made by a husband for his wife's benefit, her father being trustee.^(A)

The cases of *Matshoba vs. Klaas* (10 E.D.C., p. 135) and *Makonto vs. Mdabankulu* (H.C.G. 6, p. 244) did not decide more than that dowry paid in the Colony, could not be recovered by the payer when no legal marriage had, or was to have, taken place.

Regarding contracts to pay dowry made after a Colonial marriage had been already consummated, lack of valuable consideration would in all probability prevent their being enforced.

Although contracts to pay dowry entered into in the Colony proper cannot be enforced by the Courts there when no legal marriage is entered into, yet, if the parties contract in the Colony, and a marriage by Kafir form takes place there, and thereafter the man and wife enter and become domiciled in the Territories, such marriage is then recognised,¹⁸ and the contract to pay dowry can be enforced.

Thus, where a native, domiciled in the Territories, but absent at work in the Colony, had contracted a marriage by Native forms, and promised to pay dowry, the Court held him to his agreement on his bringing his wife to live with him in the Territories.¹⁹

Part III.—Ownership in Dowry: Consummation of Marriage.

On the marriage being consummated, the dowry paid becomes the sole property of the wife's guardian,²⁰ and he may sell

18. *Jeke vs. Judge*, J. 11, p. 125.

19. *Tala vs. Matobane*, K., 1907; H. p. 149.

20. *Tobia vs. Mamosisi*, K., 1905.

(A) The question as to whether such marriage settlements require to be in writing was not gone into in the above decision; the fact that it has been the custom for dowry contracts to be made verbally might have considerable bearing on this point. [See *Cape Law Journal*, 1909, p. 536, "Validity of Oral Antenuptial Contracts."]

or in any way dispose of it.²¹ He has an unqualified ownership in the property, and the payer loses all his rights thereto. Even after marriage is dissolved, the husband cannot claim any right *in rem* to the dowry, his action being a personal one.²²

The fact that a dowry is the second one received for the same woman, and that the first has not been returned, does not weaken the guardian's rights, in any way, once the first marriage is dissolved.²³

Part IV.—*Payment of Dowry: Procedure for Enforcement.*

If all the dowry due be not paid before marriage, as is generally the case, the husband can be compelled to pay the balance.^(B)

It must be understood that the payment of dowry is a contractual, and not a natural, obligation. The number of cattle is generally fixed, but it is sometimes left unsettled.²⁴

Some jurists consider that there is an implied acceptance by a husband of liability to pay the customary dowry when he marries by Native forms, but, at any rate amongst the tribes which do not "teleka," no action lies for the recovery of more dowry after marriage, unless a contract to pay it has been actually made.²⁵ Likewise, no action lies until the marriage has actually taken place.²⁶

21. *Tobia vs. Mamosisi*, K., 1905. *Hoole vs. Malusi*, C.T.R., 16, p. 25C (1906). *Mills vs. Bidli*, C.T.R. 15, p. 742 (1905). *Mbono vs. Manoxweni*, E.D.C., 1891.

22. *Tobia vs. Mamosisi*, K., 1905. *Hoole vs. Malusi*, C.T.R. 16, p. 250 (1906).

23. *Xabanisa vs. Dwayi*, K., 1906.

24. *Zenzile vs. Roto*, U., 1909; H., p. 223.

25. *Matshana vs. Noju* (Hlangwenis), K., 1907; H., p. 140.

26. *Matsabitsa vs. Phoorie*, K., 1895; H., p. 6.

(B) *Addendum*.—By Sec. 13 of Proc. 142 of 1910 no payment of dowry under Native custom, which may be made subsequent to December 31st, 1910, will be capable of proof in any legal suit, unless such payment shall have been declared to, and registered by, both parties thereto (or by their guardians or agents) before the resident magistrate (or assistant magistrate) of the district in which the payment shall have been made; and any person desiring to prove payment will be required to produce a certificate of registration thereof. The above section also provides how dowry payments are to be registered by the magistrates upon their being satisfied as to the accuracy of the information furnished to them; for the issue of certificates of registration; and for the registration of payment when one of the parties thereto neglects or refuses to appear and make the necessary declaration.

The mode of procedure taken to recover balance of dowry differs according to whether or not the natives concerned belong to tribes in which the custom of "uku-teleka" is practised.

This custom permits the guardian of a married woman (generally her father) to detain her at his kraal until her husband pays more dowry.²⁷ The demand is not restricted to payment of one beast only, although one animal is often accepted as sufficient.²⁸ These demands are made from time to time²⁹ on one pretext or another, *e.g.*, when children are born of the marriage,³⁰ or when the woman is visiting her own people's kraal; but she is not usually "telekaed" during her first visit home.³¹

The practice of "uku-teleka" is permitted by law.³² The Appeal Court, Kokstad, in 1906 decided³³ that if a guardian elected to "teleka" his ward he could not also sue for balance of dowry; but the same Court, in 1908, said³⁴ that "teleka" is the only means allowed to members of tribes practising it of obtaining more dowry after marriage, and that no action can be brought by them in Courts of law.³⁵ The natives of these tribes may, however, contract themselves outside the operation of Native law, and in such cases are entitled to bring actions for balance of dowry.³⁶

It appears that, if further dowry is due to a man, he may counterclaim for it in an action brought against him by his ward's husband.³⁷

Tribes which do not practise this custom of "teleka" are allowed to sue in the Courts for balance of dowry.³⁸ This is the only method adopted by members of such tribes of enforcing payment.

27. Maclean's Compendium, p. 71.

28. *Zenzile vs. Roto*, U., 1909; H., p. 223.

29. *Ibid.*

30. Maclean's Compendium, p. 118.

31. *Zenzile vs. Roto*, U., 1909; H., p. 223.

32. *Deleki vs. Bango*, K., 1905. *Mkohlwa vs. Mangaliso* (Pondos), U., 1908; H. p. 202. *Tombela vs. Ngusa*, K., 1906. *Zazela vs. Mdingwa*, K., 1904. *Mabayana vs. Zake*, K., 1903.*

33. *Tombela vs. Ngusa*, K., 1906.

34. *Manqana vs. Ntintili* (Bacas), K., 1908; H., p. 218.

35. See also *Adonis vs. Zazini*, B., 1901; W., p. 9; H., p. 46. *Mkohlwa vs. Mangaliso* (Pondos), U., 1908; H., p. 202.

36. *Manqana vs. Ntintili* (Bacas), K., 1908; H., p. 218.

37. *Deleki vs. Bango*, K., 1905.*

38. *Nqubo vs. Qubunkolo* (K., 1902) and other cases hereafter referred to.

It has been acknowledged that the tribes living in East Griqualand do not observe in some respects the customs of natives resident in the Transkei and Tembuland;³⁹ and practice has shewn that the Hlubis, Basutos and Hlangwenis do not "teleka," but recover balances of dowries by suing in the courts; and that tribes resident in the Transkei and Tembuland (as also the Bacas of East Griqualand)⁴⁰ do not sue, but resort to "teleka."

The Pondos "teleka," and, according to their customs, the children of a marriage may be detained along with their mother until released by payment of a reasonable amount of dowry.⁴¹

In the event of a dispute relative to a dowry arising between natives of different tribes, Proclamations provide that such disputes shall be tried under the laws of the defendant's tribes.^(c)⁴²

Unless there is an arrangement between the parties, fixing a specific time for the payment of any balance of dowry left unpaid at the time of the marriage, such balance, amongst tribes which do not "teleka," is payable within a reasonable time;⁴³ and there is no obligation imposed upon the wife's guardian to wait until the daughters born of the marriage marry, before claiming the balance of dowry due to him.⁴⁴

Part V.—*Payment of Dowry: From Whom Recoverable.*

The question arises as to who is liable for the dowry payable to a woman's guardian. The husband himself is always liable; and, amongst tribes which do not "teleka," his father or guardian is, in some cases, also responsible.

The fathers or guardians belonging to such native tribes are always parties to the first marriages of their sons or wards; and, as such, contract to become liable for the dowries due on

39. *Sinxoto vs. Sinekisi*, K., 1908.

40. *Manqana vs. Ntintili* (Bacas), K., 1908; H., p. 218.

41. *Mkohlwa vs. Mangaliso* (Pondos), U., 1908; H., p. 202.

42. Proc. 110 of 1879, Sec. 23.

43. *Mgogo vs. Jan.*, F., 1909; H., p. 278.

44. *Ibid.*

(c) Since, by Sec. 32 of Proc. 112 of 1879 all questions of divorce relative to marriages contracted under Colonial law must be determined according to the laws of the Colony, a husband so married could sue for restitution, if his wife were "telekaed," as this would amount to a malicious desertion. See note on page 92.

these marriages to the women's guardians.^{(D)45} When not a party to the marriages of their sons they incur no liability.⁴⁶ It is the practice to sue them along with their sons, "the one paying, the other to be absolved."⁴⁷

It is not customary for fathers and guardians to contract to pay the dowries for the sons' second wives.⁴⁸ Should they elect to do so, they will be held to their contracts,⁴⁹ but otherwise no liability attaches to them.⁵⁰

Liability to pay dowry does not cease with the death of the husband, and his heir is liable, and may be sued, as heir, for any balance due.^{(E)51} His liability extends only so far as the property inherited can meet the debt.⁵²

It may be here incidentally mentioned that it is not customary for natives to pay dowry during the time their tribe is in mourning for its paramount chief, although marriages are allowed during that period.⁵³

Part VI.—*Dowry Claims: Alternative Monetary Value.*

The alternative value placed by the Courts on dowry stock, adjudged to be paid by a husband to his wife's guardian, is materially the same as the value placed on dowry stock ordered to be returned to him on his wife's desertion. Cattle are reckoned at £5 each, horses at £5 to £10,⁵⁴ and small stock at 10s. each.⁵⁵

45. Under this custom guardians undertook the responsibility in the cases of *Zingelakahle vs. Mtshotsho* (K., 1907) and *Mkatulela vs. Lucuku* (K., 1907).*

46. *Tala vs. Matobane* (Basutos), K., 1907; H., p. 149.

47. *Vide Zingelakahle vs. Mtshotsho* (K. 1907) and other cases.

48. *Mabuyana vs. Zake*, K., 1903.* *Bokwe vs. Ntambo*, K., 1904; H., p. 75.

49. *Ibid.*

50. *Mabuyana vs. Zake*, K., 1903.*

51. *Sidona vs. Kaziwa*, K., 1906.*

52. *Ibid.*

53. *Dobeni vs. Baka* (Hlangwenis), K., 1903; H., p. 58.

54. *Pakkies vs. Boloko*, K., 1904.* *Mapanga vs. Zuma*, U., 1908; H., p. 207. *Roboshe vs. Mjikalale*, K., 1903. *Darkie vs. Charlie*, K., 1902.

55. *Pakkies vs. Boloko*, K., 1904.* *Tikolo vs. Simanga*, U., 1902; H., p. 51.

(D) If only one party is sued an exception of "non joinder" may be taken; see *Matsabitsa vs. Phoorie*, K., 1895; H., p. 6.

(E) This refers only to tribes following the customs of the Basutos. Amongst other tribes, the deceased husband's people often continue to pay further dowry for a widow in order to keep her on good terms with her own people, who might otherwise persuade her to return home.

These prices fluctuate more or less according to the market value of stock,⁵⁶ when the liability arose.⁵⁷

A horse, or ten sheep, are reckoned as equivalent to a horned beast⁵⁸ in the absence of an agreement to the contrary. Should any dispute arise as to whether animals tendered in settlement of a judgment are of the value allocated to them, they should be submitted for approval to the Magistrate of the district, in which the case was tried, or, in other words, they should be paid into court.⁵⁹ If the Court accepts them, the claim is settled, and no writ may be issued.^(F)⁶⁰

If the marriage out of which a dowry dispute arises was contracted between the parties before rinderpest,⁶¹ or during the time rinderpest was raging (1896-7),⁶² the value placed on the dowry due is £3 per head for cattle, as they were then only worth that sum.

Part VII.—*Number of Cattle Constituting a Dowry.*

The customary Hlangweni dowry is twenty cattle and one "nqobo beast."⁶³

56. Mapanga *vs.* Zuma U., 1908; H., p. 207.

57. Nqakwana *vs.* Sixinti, B., 1900; H., p. 36.

58. Tikolo *vs.* Simanga, U., 1902; H., p. 51.

59. Mapanga *vs.* Zuma, U., 1908; H., p. 207.

60. Sigyimi *vs.* Manise, 18 C.T.R., p. 487.

61. Mzanduli *vs.* Bukwana, K., 1903.* Darkie *vs.* Charlie, K., 1902. Cuntsu *vs.* Hasha, K., 1905.* Nyawozake *vs.* Gqubule, K., 1903. Nqakwana *vs.* Sixinti, B., 1900, H., p. 36.

62. Zingelakahle *vs.* Mtshotsho, K., 1907. Zazella *vs.* Mdindwa K., 1909.

63. Mzanduli *vs.* Bukwana, K. 1903.*

(F) In the case of Mgwele *vs.* Meade (E.D.C., 1907) it was held that where in an action under Native law judgment is given "for cattle or their value £—," cattle seized in execution might be refused by Plaintiff, unless of the value stated, and might be sold in the usual way by the messenger. According to true Native custom a Native, when awarded a beast, was bound to accept a beast of any age, provided it was a sound animal, and in order to carry out strict Native law it is now usual for judgment to be given for "cattle or £—" in actions where there is no special reason for putting a particular value on the stock awarded.

These prices fluctuate
value of stock,⁵⁶ when the

A horse, or ten sheep
beasts⁵⁸ in the absence of
any dispute arise as to
of a judgment are of the
be submitted for approval,
which the case was tried
paid into court.⁵⁹ If
settled, and no writ may

If the marriage out-
contracted between the parties
time rinderpest was raging,
dowry due is £3 per head
that sum.

Part VII.—*Numb*

The customary Hlala
“nqobo beast.”⁶³

56. Mapanga *vs.* Zuma

57. Nqakwana *vs.* Sixint

58. Tikolo *vs.* Simang

59. Mapanga *vs.* Zur

60. Sigyimi *vs.* Man

61. Mzanduli *vs.* Bukw
Cuntsu *vs.* Hasha, K., 1905.
vs. Sixinti, B., 1900, H., p

62. Zingelakahle *vs.* M
1909.

63. Mzanduli *vs.* Bukw

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where there is no special r
stock awarded.

The Basutos usually pay twenty cattle, one horse and ten sheep.⁶⁴ The "nqobo" beast is paid in addition.⁶⁵

The customary Hlubi dowry consists of from twenty-four to twenty-six head of cattle and one horse, and, in addition to this, a "nqutu" beast is also paid.⁶⁶ Amongst the tribes which "teleka," the usual dowry^(g) paid by the commonalty, is from eight to ten head of cattle, more or less; the number is generally fixed, but may be left unsettled.⁶⁷

The number of cattle forming the dowry varies with the status of the parties contracting the marriage, but great care should be taken, and satisfactory proof adduced, before any departure is made from the usual number.⁶⁸

When either party is a chief, the dowry paid or agreed upon would be higher than the usual one.⁶⁹ In the case of *Zingelakahle vs. Mtshotsho* (K., 1907), a Hlubi appears to have agreed to pay forty head of cattle for a chief's daughter (during "rinderpest"). Again, thirty head of cattle were paid by chief Gxaba for his fifth wife.⁷⁰

According to Warner's notes in Maclean's Compendium (p. 71), anything between twenty and thirty head of cattle forms the dowry of a chief's daughter amongst the Kafir tribes.

The number of cattle to be paid as dowry may be fixed by

64. *Mgogo vs. Jan*, F., 1909; H., 278. See claim in *Moerane vs. Phakane* (Basutos), K., 1908; H., p. 221.

65. *Mgogo vs. Jan*, F., 1909; H., p. 278.

66. *Mgabadelo vs. Mciteki*, K., 1903; H., p. 69.

67. *Zenzile vs. Roto*, U., 1909; H., p. 223. Maclean's Compendium, p. 71.

68. *Makopo vs. Tsikuane*, K., 1905.*

69. *Mzanduli vs. Bukwana*, K., 1903.*

70. *Sigidi vs. Lindinxiwa* (Pondos), U., 1902; H., p. 55.

(g) These dowries vary to some extent. The Bacas, for instance, pay anything between six and fifteen head of cattle, while the tribes in the Districts over which the Appeal Court, at Butterworth, has jurisdiction pay from five to ten head as a rule. The circumstances surrounding each case affect the number of cattle agreed upon. The price and scarcity of stock, the inclination of the parties to marry each other, the wealth and rank of the natives contracting, all influence the parties in arriving at an agreement. Amongst the Pondos, dowry is never fixed, the woman being "telekaed" from time to time. Two or three head of cattle are generally paid before the woman is handed over, and payment of one head from time to time will usually satisfy her father thereafter.

the parties to the "lobolo" contract.⁷¹ If an agreement to pay dowry is proved, but the number cannot be ascertained, the Court falls back on the custom, and awards the number usually demanded.⁷²

The number of cattle paid as dowry for a widow, or a "dikazi," is not so large as that payable for other women on their first marriage.

In one instance,⁷³ thirteen head of cattle, one horse and ten sheep formed the dowry of a "dikazi."

In another case, six head of cattle were held to be sufficient dowry for a widow.⁷⁴

In the tribes which "teleka," a widow's dowry may be even smaller than this. Thus, in one case,⁷⁵ it appears that three head of cattle were paid for a widow; and, in another case,⁷⁶ that £10 was paid for a "dikazi."

Part VIII.—*Return of Dowry:*^(H) *Effect of Conduct of Spouses Upon.*

As previously stated, one of the objects of dowry is to deter a husband from maltreating his wife; for if he ill-treats her to such an extent as to justify her in taking refuge in her father's kraal and remaining there, he will lose his right both to his wife and the dowry he paid for her. In the Transkei and Tembuland, however, he is entitled, in such cases, to the return of one dowry beast, to mark the dissolution of the marriage.⁷⁷ This custom does not seem to be in vogue in East Griqualand,⁷⁸ where no instance of it can be found.

71. *Mgabadeli vs. Mcitiki* (Hlubis), K., 1903; H., p. 69. *Sidona vs. Kaziwa*, 1906,* and other cases.

72. *Mzanduli vs. Bukwana*, K., 1903.*

73. *Pakkies vs. Boloko*, K., 1904.*

74. *Nobekwa vs. Mbali*, K., 1906.

75. *Mabengo vs. Nququ*, K., 1905.

76. *Piki vs. Madi*, K., 1905; H., p. 95.

77. *Humana vs. Xakaza*, U., 1908; H., p. 183. *Maseti vs. Meme*, B., 1906; H., p. 119. *Conana vs. Dungulu*, U., 1907; H., p. 135.

78. *Fayo vs. Manzene*, K., 1904. *Jakalase vs. Nobongo*, F., 1909; H., p. 204. *Deleki vs. Bango*, K., 1905.* *Juleka vs. Sihlahla*, K., 1905; H., p. 88. *Tetani vs. Mnukwa*, K., 1900; H., p. 38. *Maxobongwana vs. Funda*, K., 1909; H., p. 273.

(H) This subject is dealt with in Chapters i, iv, and v.

If a husband has his wife "smelt out" as a witch, he cannot reclaim her or her dowry,⁷⁹ unless he follows her up within a reasonable time, and, by payment of a fine in cattle, can persuade her guardian to induce her to return to him.⁸⁰ The amount of this fine is usually fixed by the guardian.⁸¹ It may be here mentioned that this custom of imposing a fine of a beast before returning an ill-treated wife is common amongst natives,⁸² and is not confined to cases of "smelling out" only. The fine is paid in excess of the dowry originally agreed upon.⁸³

Similarly, where a husband drove his wife away in a cruel and wanton manner on her contracting leprosy, it was held that he could not recover her dowry.⁸⁴

Another object of dowry is to deter a wife from deserting her husband without sufficient cause; for if she leaves him without being fully justified in doing so,⁸⁵ her guardian will be compelled to return part of her dowry, provided he cannot persuade her to go back.^(J)⁸⁶

This is the only action open to the husband; he cannot sue for damages for detention of his wife.⁸⁷

79. *Juleka vs. Sihlahla*, K., 1905; H., p. 88. *Mafaka vs. Dyaluvana*, U., 1903; H., p. 65. *Tsibiyana vs. Ngceni*, U., 1908; H., p. 204. *Mguzuli vs. Makawula*, K., 1905.

80. *Maxobongwana vs. Funda*, K., 1909; H., p. 273.

81. *Ibid.*

82. *Zenzile vs. Roto*, U., 1909; H., p. 223.

83. *Ibid.*

84. *Nyangweni vs. Magadlela*, U., 1896; W., p. 30; H., p. 14.

85. In the case of *Mrwebi vs. Msindo* (U., 1903; H., p. 63) the Court held that the wife was justified in leaving her husband to go to live with her eldest son on his establishing a kraal of his own, it being customary for wives to do so.

86. *Mketshani vs. Reid*, U., 1901; H., p. 41; W., p. 41.

87. *Mketshani vs. Reid*, U., 1901; W., p. 41; H., p. 41.

(J) There is one exception to this otherwise general rule; for, amongst the Pondos, a man who has married a widow cannot claim the return of any dowry he may have paid to her father, should she return to her late husband's people after bearing children; but, should she desert to the kraal of her father, action for return of dowry does lie. In either case, the children begotten of the second marriage belong to him, but the children begotten after the woman has deserted to her first husband's kraal belong to that kraal. However, the marriage with the second husband is not necessarily dissolved by her return to her first husband's people, and, on their not treating her properly, she may go back to her second husband. *Dlelani vs. Mkayi* (Pondoc), U., 1909; H., p. 240.

The Court, however, will not permit the husband to commit an act of spoliation in getting back his stock, even though Native law may allow it.⁸⁸

The following cases bear on the subject under discussion:—

Where a woman refused to live with her husband, her guardian was ordered to hand back the woman, or her dowry.⁸⁹

Again, where a native had ill-treated his wife, but not to such an extent as to justify her, in the opinion of the Court, in abandoning him altogether, it was held that either the woman or her dowry must be returned to her husband.⁹⁰

Again, where a husband had assaulted his wife, and there had been faults on both sides, and the wife had gone to her parents, the Court ordered her to return, or, in default thereof, the restoration of five head of cattle out of a dowry of ten head; the Court remarking that the husband's conduct was not such as to warrant his forfeiting all the dowry paid.⁹¹ There were two children born of the marriage, and the husband would not, in any case, have recovered more than seven head. Thus he was practically ordered to forfeit two of his cattle for his misconduct.

In another case⁹² the Court also held that a common assault was not sufficient cause to deprive a husband of most of the dowry stock he had paid for his wife. This case was returned to the Magistrate to be tried on its merits. On this being done, it was found that, although the husband had ill-treated his wife, the ill-treatment was not of a serious nature. On the matter coming again before the Appeal Court, an extra beast was allowed to the woman's guardian out of the dowry ordered to be returned to the husband. This was to mark the Court's disapproval of his action.⁹³

It must be borne in mind that natives, under their laws, had the right to beat their wives for misconduct.⁹⁴ Thus an assault in their eyes is not such a glaring offence as in the eyes of Europeans.

88. *Ncolama vs. N'cume*, J. 10, p. 207. *Ngqobela vs. Sihele*, J. 10, p. 346.

89. *Stuurman vs. Thompson*, K., 1903.

90. *Mlizana vs. Gameli*, K., 1903.

91. *Present vs. Jwaqa*, K., 1903. [See also *Kele vs. Ketj*, U., 1908; H., p. 171.]

92. *Maqubu vs. Sitini*, K., 1905.*

93. *Maqubu vs. Sitini*, K., 1905 (second case).

94. *Maclean's Compendium*, p. 121.

That adultery of a wife is, under certain circumstances, sufficient ground for dissolving a marriage contracted according to Native custom was laid down in the case of *Faroe vs. Moleko* (K., 1905).*

Simple adultery in itself is not sufficient ground for a husband to divorce his wife and claim the return of her dowry;⁹⁵ but where, after remonstrance, the wife is guilty of repeated adultery, or where a wife who becomes pregnant by another man refuses to divulge his name, or obstructs her husband in his action against the adulterer, a divorce may be properly sought;⁹⁶ unless the husband has condoned the offence by cohabitation and by his general conduct,⁹⁷ or by recovering damages from the woman's paramour.⁹⁸

Part IX.—*Return of Dowry: From and by Whom Recovered.*

When a woman deserts her husband, he generally sues for her return or the return of her dowry. The summons is directed against her guardian, and not against the wife herself, and may be taken out either by the husband or by his father (or guardian), no regard being had as to which of them actually paid over the cattle.⁹⁹ No action lies against a third party harbouring the deserting wife. In such a case the proper person to be sued is the man to whom dowry was paid,¹⁰⁰ generally the woman's guardian.

It has happened that a woman has been given in marriage by a man who had no right to do so, and in such cases the Court has held that, if the woman thereafter leaves her husband and returns to her rightful guardian, or if he takes her from her husband pending payment of dowry, the husband's action for return of dowry lies against the man to whom he had paid it.¹⁰¹

95. *Nonkepu vs. Makuzeni*, K., 1908. *Ngawana vs. Makuzeni*, K., 1908; H., p. 220. *Conana vs. Dungulu*, U., 1907; H., p. 135. *Jakalase vs. Nolonga*, F., 1909; H., p. 203. *Tenani vs. Mnukwa*, K., 1900; H., p. 38.

96. *Ngawana vs. Makuzeni*, K., 1908; H., p. 220.

97. *Roji vs. Jongola*, B., 1908; H., p. 199.

98. *Tetani vs. Mnukwa*, K., 1900; H., p. 38. *Conana vs. Dungulu*, U., 1907; H., p. 135.

99. *Mzama vs. Xekana*, B., 1903; H., p. 61.

100. *Maseti vs. Sinxoto*, B., 1908; H., p. 197.

101. *Tyipana vs. Ncitshe*, K., 1906. *Bokolo vs. Mavume*, K., 1906; H., p. 1909. *Roboshe vs. Njikalale*, K., 1903. *Tshobisa vs. Gugushe*, K., 1907; H., p. 139.

If the native receiving the dowry contends that he did so on behalf of, and as agent for, an absent rightful guardian, the onus of proof is upon such agent, and, unless he discharges it, he may be sued; for, if this were not so, a husband might be referred from one relative to another until his substance was wasted.¹⁰² If the recipient proves he has handed the dowry to the woman's guardian, he is absolved; but it is the duty of such agent in these cases to render the husband every assistance in recovering his dowry.¹⁰³ Thus, where a man who had received dowry refused to accompany the husband to the wife's real guardian, on a dispute arising as to whether he had a right to receive it, the Court said that that was pretty clear proof that he had no such right, and that he had been properly sued for return of the dowry.¹⁰⁴

In the absence of *mala fides*, a dowry, paid to a guardian acting with the payer's knowledge on behalf of a minor heir, can only be reclaimed from the heir on his reaching majority,¹⁰⁵ or from the guardian, in his representative capacity, during the heir's minority.

Part X.—*Return of Dowry: (κ) Deductions Allowed to Wife's Guardian. (1)*

It has been the practice for many years to allow the wife's guardian to retain, from the dowry ordered to be returned upon her desertion, one head of cattle for each of the children born of the marriage.¹⁰⁶

102. Tshobisa vs. Gugushe, K., 1907; H., p. 139.

103. Mbekeni vs. Mbejeni, U., 1896; H., p. 13.

104. Roboshe vs. Njikalale, K., 1903.

105. Bacela vs. Ngwakuzayo, U., 1909; H., p. 259.

106. Darkie vs. Charlie, K., 1902. Zazela vs. Mdindwa, K., 1904. Seyolula vs. Mda, K., 1902. Tikolo vs. Simanga, U., 1902; H., p. 51. Dweba vs. Sam, K., 1895; H., p. 5. Mapango vs. Zuma, U., 1908; H., p. 207. Gxonono vs. Skuni, F., 1907; H., p. 154. Lupuzi vs. Sontondoshe, B., 1909; H., p. 268.

(κ) The husband should see that all dowry cattle, due to him, are returned when a dissolution of marriage has been arranged; for there is a presumption that the cattle then handed him by his wife's guardian are paid in settlement of his claim (*Humana vs. Xakaza*, U., 1908; H., p. 183).

(1) See Chapter v, Part iii.

Miscarriages are not reckoned as "births," and no allowance is made for them.¹⁰⁷

The Courts of East Griqualand have further allowed the woman's guardian to retain one¹⁰⁸ or two beasts from the dowry for her services to her husband during her stay at his kraal. This deduction does not appear to be always allowed amongst the tribes in Tembuland¹⁰⁹ and the Transkei;¹¹⁰ but these natives permit the woman's guardian to keep a beast as compensation for her wedding outfit.¹¹¹

No animal is claimable for the woman's services unless a child has been born of the marriage.¹¹²

The following cases illustrate what deductions are usually made:—

Where a wife had had five children, and was pregnant of the sixth at the time of her desertion, her guardian was ordered to return two head of cattle out of a dowry of ten paid to him.¹¹³

Again, where a wife had lived four years with her husband, and had borne him two children before desertion, the Court refused to allow her guardian to deduct more than four head of cattle out of a dowry of eight head; the Court saying that the allowance was a very liberal one.¹¹⁴

Again, where two head of cattle were allowed in the Court below for a woman's services, in addition to two head of cattle deducted for two children born, the Appeal Court refused to give her husband more than the number of stock awarded to him by the magistrate. It remarked that the number of cattle allowed to the guardian was "not too many."¹¹⁵

Likewise, the Court, in another case, allowed a guardian to deduct five head of cattle for five children born of his ward to her husband, and also allowed him two head of cattle from

107. *Ngweqwana vs. Papiso*, K., 1903.

108. *Zazela vs. Mbundwa*, K., 1904. *Seyolula vs. Mda*, K., 1902. *Dweba vs. Sam*, K., 1895; H., p. 5. *Gxonono vs. Skuni*, F., 1907; H., p. 154.

109. *Mapango vs. Zuma*, U., 1908; H., p. 207. *Tikolo vs. Simanga*, U., 1902; H., p. 51.

110. *Pumlomo vs. Mbusi*, B., 1908; H., p. 179.

111. *Tikolo vs. Simanga*, U., 1902; H., p. 51. *Ndaba vs. Kutv* (Pond.), U., 1904; H., p. 84.

112. *Humana vs. Xakaza*, U., 1908; H., p. 183.

113. *Ngweqwana vs. Papiso*, K., 1903.

114. *Gaula vs. Mangqubula*, K., 1905.

115. *Mankema vs. Gigli*, K., 1905.

the dowry for the woman's services. In this case twenty-one head of cattle were awarded to the husband.¹¹⁶

Again, where a wife left her husband after having had two children by him, and her sister had then been "put in her place," and she likewise had had two children and deserted, it was held that their guardian might deduct only four cattle from the dowry he was thereupon ordered to return.¹¹⁷

Again, where a man paid part dowry, and took the woman to wife on the condition that in the event of his not paying more dowry the cattle already paid were to be reckoned as a fine for her seduction, which had previously taken place, it was held that he could not recover any of the stock on his wife deserting him.¹¹⁸ In this case the Court ordered the woman to be returned on her husband's tendering the balance of dowry, but not otherwise.

Again, where a woman stayed a "short time" with her husband, and deserted before she had borne him a child, the Court ordered all the dowry to be returned,¹¹⁹ holding that the use of the cattle by the father compensated him for the use of the woman by her husband.¹²⁰ The woman's guardian in such cases cannot claim the right to retain one of the dowry cattle to mark the dissolution of the marriage.¹²¹

In a case where three head of cattle had been paid as dowry, and five children had been born of the marriage, and the wife had then deserted, the Court ordered her and her children to be returned to her husband upon his paying three more head of cattle for her.¹²²

Part XI.—*Return of Dowry: "Nqutu" and Other Beasts.*

A husband cannot recover the "nqobo" beast when suing for the return of dowry on his wife's desertion, even if he has never deflowered her.¹²³ Neither can he claim back the "clean-

116. *Cuntsu vs. Hashe, K.*, 1905.*

117. *Kewuti vs. Qumba, K.*, 1902.

118. *Mzanduli vs. Bukwana, K.*, 1903.*

119. *Mangubula vs. Madolshi, K.*, 1905. *Humana vs. Xakaza, U.*, 1908; H., p. 183.

120. *Mangqubula vs. Madolshi, K.*, 1905.*

121. *Humana vs. Xakaza, U.*, 1908; H., p. 183.

122. *Fayo vs. Manzeni, K.*, 1904.

123. *Mankema vs. Gidli, K.*, 1905. *Magwanya vs. Mtambeka, K.*, 1901; H., p. 42.

sing beast,¹²⁴ or the "nqutu beast;¹²⁵ for these animals do not form part of the dowry, and, when once paid, the husband loses all claim to them. Cattle slaughtered at the marriage feasts are never taken into account when the number of dowry cattle to be returned is discussed. No trace of either party ever putting forward such a claim is found in the records in the courts of East Griqualand. There appears, however, to have been an attempt to do so at Butterworth, but the Court refused to entertain it.¹²⁶

Part XII.—*Return of Dowry: Death of Wife.*

The Appeal Court of East Griqualand has held that it is usual Native custom amongst "nearly all tribes"¹²⁷ that part of the dowry paid by a husband must be returned to him on his wife's dying within a few years of her marriage,¹²⁸ unless it can be arranged for another woman to be supplied to fill her place.¹²⁹ This second woman is generally a sister of the deceased wife.

This custom of substitution is sometimes resorted to when a wife has deserted her husband, but is not in vogue amongst the better class of natives.¹³⁰

What portion of the dowry should be returned in these cases depends upon the surrounding circumstances. Thus, where six head of cattle had been paid, and the woman had died after having had one child, the Court took into consideration the fact that her husband had eloped with her in the first instance, and that her guardian had borne the expenses of her illness.^(M) Three head of cattle were ordered to be returned to her husband.¹³¹

124. *Maqubu vs. Sitini*, K., 1905 (second case). *Mzanduli vs. Bukwana*, K., 1903. *

125. *Mankema vs. Gidli*, K., 1905.

126. *Tshaka vs. Buyesweni*, H., p. 144 (1907).

127. *Bunge vs. Ndlayla*, K., 1907, H., p. 153.

128. *Ibid.*

129. *Mkatulela vs. Lucuku*, K., 1907. * *Jumba vs. Dubulukwele*, B., 1906; W., p. 26; H., p. 119.

130. *Kewuti vs. Qumba*, K., 1902.

131. *Mpakanyiswa vs. Ntshangase (Fingos)*, K., 1897; H., p. 17.

(M) See also *Tikolo vs. Simanga* (U., 1902; H., p. 51), where the expense of the woman's illness was also debited against her husband, and deducted from the dowry returnable.

It has also been held by the Appeal Court, at Umtata, that, amongst natives under its jurisdiction, dowry is returnable where no child is born of an early dying wife; and that, should a woman die after having had one or two children, one beast for each child born (whether the child lives or dies) may be deducted by her guardian from the cattle to be returned. The Court further said that the number of cattle to be returned must be decided by the circumstances of each case.¹³²

Thus, where a woman had died of leprosy contracted at her husband's kraal, without bearing any children, her guardian was ordered to return four head of cattle out of a dowry of ten head. There were other cases of the disease at the husband's kraal, and he had, in the Court's opinion, exposed his wife to the sickness by bringing her there.¹³³ Again, where a deserting wife died shortly after marriage, having no children, the Court allowed her guardian to retain two head of cattle out of her dowry of four head, "to wipe his tears away."¹³⁴

The Appeal Court, at Butterworth, decided that, amongst natives under its jurisdiction, never more than half the dowry is reclaimable in these cases, as the father of the deceased woman is also entitled to consideration for the loss of his daughter. This Court likewise said that the circumstances surrounding each case affected the division of the dowry stock.¹³⁵

According to Pondo experts, the dowry must be halved where a woman dies without issue shortly after marriage^{(N)136}; but if there is issue¹³⁷, or the woman lives with her husband until she is old¹³⁸, then no dowry is returnable.

Amongst the Gcalekas the dowry paid is halved upon a wife's early death before she has had a child.¹³⁹

132. *Njobeni vs. Mzini*, U., 1899; W., p. 31; H., p. 29.

133. *Ibid.*

134. *Kowe vs. Mbilini*, U., 1901; H., p. 41.

135. *Jumba vs. Dubulukwele*, B., 1906; W., p. 26; H., p. 119.

136. *Kutu vs. Ndaba* (Pondos), U., 1904; W., p. 32; H., p. 84.

137. *Ibid.* Expert evidence *Mfuzana vs. Wezi*, F., 1910.

138. *Tsweleni vs. Nyila*, U., 1909; H., p. 256. Expert evidence *Mfuzana vs. Wezi*, *supra*.

139. *Jangumbona vs. Plati*, B., 1901; H., p. 39.

(N) In a later case (*Mfuzana vs. Wezi*, F., 1910) the Pondo assessors stated that in these cases the greater portion of the dowry is returned; and that it was immaterial to a claim for return of dowry whether the woman dies at her husband's or at her father's kraal.

If a wife commits suicide shortly after marriage, part of her dowry must be returned to her husband. Thus, in a case where a woman did so after having lived eighteen months with her husband, the Court ordered half the dowry to be returned, less one beast which was allowed to the woman's guardian "for the wedding outfit." This was held to be an equitable division in this particular case.¹⁴⁰

A husband is entitled to the return of some of the dowry should his wife die after all her children have predeceased her. Thus, where a woman had had five children, who had all died before her, her husband was held to be entitled to recover six head of cattle out of a dowry of ten head.¹⁴¹

There are special cases in which dowry cannot be reclaimed by the husband on the early death of his wife; as, for instance, where her death is attributed to him.¹⁴²

Death of a wife in childbirth is considered to be caused by the husband, as the natives hold that he is directly responsible for the woman's condition.¹⁴³ The husband has no action for the return of dowry in such cases.¹⁴⁴ This is the law amongst the Basutos,¹⁴⁵ and nearly all the Bantu tribes,¹⁴⁶ including the Gaikas, Fingos, Gcalekas,¹⁴⁷ and Tembus.¹⁴⁸ Although this is the rule, it does not appear to be final, for the Court, in the case of *Jumba vs. Dubulukwele (infra)*, stated: "There are circumstances under which dowry is not recoverable, such as death of the wife from childbirth; but the conditions of each particular case govern the number of cattle, if any, to be restored." The Pondos do not follow the custom of these other native tribes. According to Pondo law, a husband is entitled to claim back some

140. *Kutu vs. Ndaba (Pondos)*, U., 1904; W., p. 32; H., p. 84.

141. *Teti vs. Mtyeniswa*, K., 1906.*

142. §Qoboshiyana *vs. Quta*, K., 1905. *Njobeni vs. Mzini*, U., 1899; W., p. 31; H., p. 29. §Nkosana *vs. Mazendala (Basutos)*, K., 1908. *Jumba vs. Dubulukwele*, B., 1906; W., p. 26; H., p. 119.

143. §Qoboshiyana *vs. Quta*, K., 1905. *Njobeni vs. Mzini*, U., 1899; W., p. 31; H., p. 29.

144. *Qoboshiyana vs. Quta, supra. Mampondo vs. Gongota*, F., 1906; H., p. 123.

145. §Nkosana *vs. Mazendala (Basutos)*, *supra*.

146. *Qoboshiyana vs. Quta* and *Njobeni vs. Mzini, supra*.

147. *Mampondo vs. Gongota, supra*.

148. *Ngxakambana vs. Bokolo (Bacas)*, K., 1899; H., p. 27.

§The Court in these cases held that no portion of the dowry was recoverable by the widower.

cattle^(o) on his wife's dying in her first childbirth, provided he has paid more than two beasts. For instance, if three cattle have been paid, he is entitled to the return of one animal; if four cattle formed the dowry, he may demand half, and so on. However, it is considered a breach of etiquette on the husband's part to put forward a claim in these cases.¹⁴⁹

In former times, the Bacas followed the same custom as the other Bantu tribes; but of later years they have divided the dowry between the husband and the wife's people. Thus, out of a dowry of sixteen head, the husband was awarded eleven head of cattle on his wife's dying in premature first confinement.¹⁵⁰

Amongst all tribes, should a wife predecease her husband after living with him for many years, no return of dowry can be claimed;¹⁵¹ but in East Griqualand, on the other hand, the balance of dowry due to her guardian may apparently be recovered by him.¹⁵²

Should it be arranged for a second woman to take the place of a wife dying shortly after marriage, then the widower is liable, upon taking the woman, for the balance of dowry due for his first wife, in the same way as if she had never died;¹⁵³ but, otherwise, no further calls may be made upon him.¹⁵⁴ This is so, even should his wife have died in childbirth.¹⁵⁵ This rule was applied to a case where the firstborn child, whose birth caused its mother's death, was begotten of the husband's brother, to whom she had been "ngenaed" owing to the early death of her husband.¹⁵⁶ Hlubi ideas do not differ from that of other tribes as regards this custom.¹⁵⁷

149. Mampondo *vs.* Gongota, F., 1906; H., p. 123.

150. Ngxakambana *vs.* Bokolo (Bacas), K., 1899; H., p. 27.

151. Maclean's Compendium, p. 72.

152. Pakkies *vs.* Boloko, K., 1904.* Deleki *vs.* Bango, K., 1905.*

153. Mgabadeli *vs.* Mciteki (Hlubis), K., 1903; H., p. 69.

154. *Ibid.*

155. Mgabadeli *vs.* Mciteki (Hlubis) K., 1903; H., p. 69.

156. *Ibid.*

157. *Ibid.*

(o) In a later case the Pondo assessors stated: "If a woman dies in childbirth, either at the husband's or father's kraal, having borne no other children, one beast is deducted for the child, and one for the wedding outfit (if any), and the balance of the dowry is divided between the father and the husband." The assessors further stated that if a wife dies in childbirth, whether at her father's or husband's kraal, after having had one or more children, no dowry is returnable. See Mfuzana *vs.* Wezi, F., 1910.

While dealing with this subject, it may be mentioned that in one case the parties agreed that the dowry paid for a woman, who had died about the date of her marriage, should be counted as part of the dowry of her sister, who, it was agreed, should marry the widower's brother. The Court upheld the agreement, remarking that it was an unusual one.¹⁵⁸

Part XIII.—*Return of Dowry: Effect of Form of Marriage on.*

The form of celebration of marriage does not in any way affect the rules relative to the return of dowry paid in connection therewith; for the Court has held that, where dowry is paid in accordance with Native custom, the question of its return must be determined under Native law.¹⁵⁹ This principle was upheld in the case of *Siyotula vs. Mda* (K., 1902), where a deceased husband's father was permitted to sue, and obtained judgment, for the return of the dowry paid by his son under Native custom, notwithstanding that the marriage had been solemnized in 1895 (after annexation) according to Christian rites. The usual number of stock was allowed to the wife's guardian for her children and services, etc.

Again, in a further case, where a Christian marriage had been dissolved on the ground of malicious desertion by the wife, it was held that her husband might claim back all her dowry, as she had only stayed a "few months" with him.¹⁶⁰ No cattle were allowed for the woman's services, owing to the short time she had remained with her husband.

These decisions are consistent with the definition of dowry accepted by the Eastern Districts Court in the case of *Mbono vs. Manoxweni* (1891), recited earlier in the chapter, as also with the Colonial law in respect of the forfeiture of benefits of antenuptial contracts by defaulting spouses.

However, the Court has laid down that a native cannot accept all the advantages of a Christian marriage, but none of its disadvantages. For this reason, where a guardian, whose ward had married by Christian rites, and had been divorced from her husband on the ground of her adultery, pleaded (when sued for return of dowry) that adultery was not in itself a sufficient

158. *Mkatulela vs. Lucuku*, K., 1907.*

159. *Zace vs. Tukani*, K., 1908; H., p. 202. *Samson vs. Mbango*, B., 1908; H., p. 217. *Matee vs. Njongwana*, K., 1909; H., p. 272.

160. *Mfombi vs. Galo*, K., 1907.

cause under Native law on which to base a claim for dissolution of marriage and return of dowry, the Court said that the plea could not be upheld.¹⁶¹

On the same principle it was also held that, where a native took another woman to wife under Native custom while his first wife, married to him by Christian rites, was yet alive, he could not reclaim the dowry paid for his first wife, who had obtained a judicial separation on his contracting the second "marriage."¹⁶²

Before a native married according to Colonial law can claim back any dowry due to him by his wife's people, his marriage must be either dissolved,¹⁶³ or suspended by a judicial separation.¹⁶⁴

Part XIV.—Return Dowry: Miscellaneous.

When a woman has been ordered to be returned to her husband, she does not comply with the judgment by merely nominally doing so. Thus, in two cases, in the first of which the wife had returned for one month, and in the second for six days, the Court held that they had not satisfied the judgments, and that writs for return of dowry could be validly issued.¹⁶⁵ In both cases the wives could shew no good ground for leaving a second time.

The wife's guardian cannot escape liability for return of dowry because the original cattle he received have died, or because his ward has never returned home after deserting her husband;¹⁶⁶ but, on judgment for return of dowry being given, the guardian may legally insist upon returning the identical cattle he received, and the husband cannot refuse to accept them.¹⁶⁷

The return of dowry may be claimed in the Courts of the Colony proper when the guardian of the wife is domiciled there. This may be done when the marriage has been contracted in the Territories between unmarried natives; but not if the marriage,

¹⁶¹ *Faroe vs. Moleko*, K., 1905.*

¹⁶² *Kumalo vs. Zamela*, K., 1903.

¹⁶³ *Makalima vs. Tswyi*, K., 1904; H., p. 76.

¹⁶⁴ *Kumalo vs. Zamela*, *supra*.

¹⁶⁵ *Ngwenerana vs. Mtyo* K., 1907. *Mangceza vs. Dlangani*, F., 1906; H., p. 125.

¹⁶⁶ *Mabona vs. Lolwana*, K., 1903.

¹⁶⁷ *Mapango vs. Zuma*, U., 1908; H., p. 207. See also *Maseti vs. Meme*, B., 1906; H., p. 119.

out of which the dowry dispute has arisen, is a polygamous one.¹⁶⁸

In an action in the Territories for the return of a wife or a dowry, a plea that the woman has been "telekaed" is a good defence, whether the husband is in a position to pay more dowry or not;¹⁶⁹ and before it can be disregarded it must be shewn that the stipulated number, or, if no number was stipulated, then a sufficient number, of dowry cattle has been paid.¹⁷⁰ This refers to natives who practise "teleka."

The husband cannot retain cattle lent to his wife by her father and set them off against dowry cattle due to him on her desertion;¹⁷¹ but he can set off and retain in such cases any stock given as "umbulunga" to his wife by her guardian.¹⁷² In like manner, the wife's guardian can insist that "umbulunga" cattle in the husband's possession be set off against a return of dowry due to the latter.¹⁷³

As previously stated, the ownership of dowry after marriage vests in the wife's guardian. For this reason, increase born of dowry stock after marriage has taken place also belongs to the guardian; and the husband cannot claim it when seeking the return of dowry.¹⁷⁴ There are, however, exceptional cases in which a husband may be permitted to recover increase along with the original stock.¹⁷⁵ Thus, where two cattle, heavy in calf, were paid as dowry, and they calved after marriage, but before the wife deserted (which she did before she had been one month with her husband), it was held that the increase should be returned to the husband along with the cows.¹⁷⁶

Should a marriage be declared void *ab initio* by reason of the husband's impotency, the Court allows him to recover part of the dowry paid. This is so, even if he knew of his defect

168. Ngqobela *vs.* Sihele, J., 10., p. 346.

169. Ndabeni *vs.* Tingatinga, B., 1907; H., p. 42. Zenzile *vs.* Roto, U., 1909; H., p. 223. Adonis *vs.* Zazini, B., 1901; H., p. 46.

170. Mnlanganiso *vs.* Majezi, U., reported in *Territorial News* of Umtata, August 14th, 1909.

171. Nyawozake *vs.* Gqubale, K., 1903.

172. Mvalo *vs.* Malgas, U., W., p. 1.

173. Tshaka *vs.* Buyesweni, B., 1907; H., p. 144.

174. Dliwako *vs.* Makonco, F., 1905; H., p. 93.

175. Mqatshukwa *vs.* Matshomela, K., 1905.*

176. *Ibid.*

before marriage.¹⁷⁷ In both cases quoted, the husband recovered two head of cattle out of a dowry of five or six head paid by him.

The chiefs of independent tribes are never liable, according to true Native law, to return the dowries of their daughters;¹⁷⁸ but it is doubtful whether the Courts will perpetuate this custom, which is based on the rule, "might is right,"¹⁷⁹ and is not in accordance with the recognised definition of a "ukulobolo" contract. At any rate, it has been held that petty chiefs cannot escape liability by reason of their rank;¹⁸⁰ likewise, when one of the parties is a commoner, payment cannot be evaded under this custom.¹⁸¹

Part XV.—*Extraneous Actions Arising out of "Lobolo" Contracts.*

A native (or his heir¹⁸²), in the tribes of the Transkei and of Tembuland, has the right (under the "ukufakwa" custom) to claim from his adopted son,¹⁸³ or from any son or other male ward,¹⁸⁴ the dowry that the latter may have received for his eldest daughter, should he have more than one daughter, or a portion of such dowry, should he have only one girl.¹⁸⁵ These cattle are due in consideration of the father or guardian having paid dowry for his son's, or ward's, wife.¹⁸⁶ As a rule, the "intonjane" and marriage expenses of the girl whose dowry is to be paid over are borne by the man who is ultimately to receive her dowry; otherwise, they are deducted from the dowry before it is parted with.¹⁸⁷

177. *Simanga vs. Gaqa*, B., W., p. 11. *Siyikili vs. Qika*, B., 1904; W., p. 19; H., p. 73.

178. *Welapi vs. Mbango*, K., 1895; H., p. 2.

179. *Ibid.*

180. *Ibid.*

181. *Matwa vs. Marexe*, F., 1909; H., p. 277.

182. *Nzima vs. Hlahleni*, U., 1900; H., p. 35.

183. *Kokwe vs. Gubela*, B., 1902; W., p. 10; H., p. 48.

184. *Manyosine vs. Nonkanyezi* (Pondos), U., 1906; H., p. 114. *Nzima vs. Hlahleni*, U., 1900; H., p. 35. *Qubenge vs. Hoya*, U., 1909; H., p. 249.

185. *Kokwe vs. Gubela*, *supra*.

186. *Qubenge vs. Hoya*, U., 1909; H., p. 249. *Kokwe vs. Gubela*, B., 1902; W., p. 10; H., p. 48.

187. *Nzima vs. Hlahleni*, U., 1900; H., p. 35.

In the case of *Ladlokova vs. Hlapezula* (K., 1908), it was held that the whole of the dowry of the eldest daughter of an adopted son must, without any deduction whatever in favour of her father for keeping her, be paid to his adopting father for having supplied him with a wife.

Should a son dispute his father's right to claim under this custom, it is not necessary for the latter to wait until his granddaughter is married, and her dowry paid, before bringing an action for a declaration of rights in respect of such future dowry.¹⁸⁸

Another claim arising out of marriage is one for "litsua" ("ditsua") cattle amongst the Basutos. "Litsua" are stock paid to a maternal uncle out of the dowries received for his nieces. As many as ten cattle are sometimes handed to the uncle if there is only one niece born of his sister's marriage, and the dowry of such niece is a good one. If there is more than one niece, some cattle are taken from each of their dowries.

"Litsua" cattle are paid for past services rendered by the uncle to his nieces, such as for having had them to stay with him, etc.

The courts have held that the payment of "litsua" cattle is a moral, and not a legal, obligation, and cannot be enforced.¹⁸⁹

Out of the claim for "litsua" arises that for "matlala." The word "matlala" signifies pieces of meat given to a grandfather and grandmother. "Matlala" is a voluntary gift made by an uncle out of his "litsua" cattle to the maternal grandfather, or, if he be dead, to the maternal grandmother,¹⁹⁰ of a girl. "Matlala" is paid in consideration of the grandparents taking interest in the welfare of the girl from whose dowry the "litsua" are taken, and as their share of the "litsua" received.

The obligation to pay "matlala" is a voluntary one, and cannot be enforced.¹⁹¹

Amongst the Pondos and Tembus there is a custom called "ukuhlama," by which one native makes a present—in some cases, of an animal—to a friend. In return for this, the donee is expected to reciprocate the good feeling by enriching the bene-

188. *Njoko vs. Gqoxombana*, U., 1908, W., p. 15; H., p. 205.

189. *Monyani vs. Ramakaela*, K., 1904. *Phirimana vs. Khetsi*, K., 1904; H., p. 83. *Ramakoala vs. Kapari*, K., 1906; H., p. 131.

190. *Ntseki vs. Ntseki*, K., 1896; H., p. 9.

191. *Ramakoala vs. Kapari*, K., 1906; H., p. 131.

factor either out of the dowries of his (the donee's) daughters, or at some other time agreed upon or left unsettled. The obligation imposed upon the donee is a moral, and not a legal, one.¹⁹²

"Calabash" Cattle.—These are stock sometimes paid to, and chosen by, a married woman of a Pondo, or a Pondomisi, tribe out of the dowries of her daughters. Legally she has no claim to such cattle. During her lifetime they should remain at her husband's kraal. Upon her death, and after the death of her husband, they are inherited by the youngest son of her "house," and not by the eldest, as is the case with other property.¹⁹³

192. Madalane vs. Mqoboli, U., 1909; H., p. 237.

193. Dingezweni vs. Ndabambi (Pondos), F., 1906; H., p. 126.

CHAPTER IV.

DISSOLUTION OF MARRIAGE.^(A)Part I.—*Dissolution as affected by Form of Marriage.*

Regarding questions of divorce and separation arising between natives married by Native forms before and after annexation of the Territories, Proclamations¹ provide that they shall be dealt with according to the Native laws and customs in force at the time of the celebration of the marriages out of which they arise. Magistrates have jurisdiction to try such cases.²

Regarding questions of a similar nature arising out of marriages celebrated in the Territories before or after annexation by ministers of the Christian religion, or after annexation by civil marriage officers, Proclamations provide that they shall be decided according to the law in force in the Colony proper at the time of such marriages.³

Questions of divorce arising out of Native marriages, duly registered, are dealt with under Colonial law.^{4(B)}

Part II.—*Jurisdiction.*^(C)

The Chief Magistrates have jurisdiction in cases of divorce and separation arising out of marriages contracted under Colonial law.

1. Proc. 140 of 1885, Sec. 32. *Luseti vs. Ben, U., W.*, 33.

2. *Ibid.*

3. Proc. 140 of 1885, Sec. 31.

4. *Ibid.*

(A) This subject is partly dealt with in Chapters iii, v and vii.

(B) *Addendum*.—Secs. 30 to 37 of Proc. 140 of 1885 will be repealed by Proc. 142 of 1910, in so far as they are inconsistent with the later Proclamation.

(C) *Addendum*.—By Sec. 6, Proc. 142 of 1910, resident magistrates will still have jurisdiction to try cases arising out of marriages by Native forms (including questions of separation and divorce). An appeal will

Under Act 35 of 1904, this jurisdiction was taken away from them; but it was restored by Act 29 of 1906.

Until 1906, when the original Proclamations of annexation were amended, there was no direct statutory authority giving resident magistrates jurisdiction over cases of divorce arising out of native marriages entered into after annexation.⁵

However, resident magistrates have always had unlimited jurisdiction (except for the restrictions contained in Sec. 32 of Proc. 110 of 1879), and the Appeal Court at Butterworth decided⁶ that, this being so, Magistrates had power to try such cases of divorce, under Sec. 23 of the said Proclamation, at the instance of either husband or wife. This section states that cases between natives may be dealt with according to Native custom by Magistrates.

Part III.—*Dissolution at Husband's Instance.*

A native marriage may be dissolved by the husband. He can do so by simply driving his wife away from his kraal with the intention of permanently discarding her.⁷ The Court has held that he may thus divorce his "great wife," or any other wife,⁸ but, in doing so, he loses all the right he may have had to claim back the dowry he paid for her.⁹

A husband may sue for a dissolution of marriage on his wife refusing to perform her lawful and domestic duties, even though she may be willing to remain at his kraal without doing

5. Before the amendment by Proc. 466 of 1906, the Supreme Court held in the case of *Ngqobela vs. Sihele* (J. 10, p. 346), that questions of divorce and separation relative to such marriages were to be tried under Colonial law.

6. *Nonafu vs. Piki*, B., 1906; W., p. 25; H., p. 120.

7. *Conana vs. Dungulu*, U., 1907; H., p. 135. *Mzambalala vs. Silinga*, B., 1901; W., p. 7; H., p. 40.

8. *Mbono vs. Sifuba*, K., 1907; H., p. 137.

9. *Mzambalala vs. Silinga*, *supra*. *Mbono vs. Sifuba*, *supra*.

lie from their judgments to the Native Appeal Courts. These cases will be tried according to Native law subject to the provisions of Secs. 2, 3, and 11 of that Proclamation. By Section 6 all questions arising out of marriages contracted according to Colonial law, or any registered Native marriage, will, subject to the provisions of Secs. 4 and 5, be decided under the law of the Colony in the Court of the Chief Magistrate, subject to an appeal to any superior Court having jurisdiction, or in any such last-mentioned Court.

them. Thus, a divorce was granted where the woman had lived unhappily with her husband, refused to allow him his conjugal rights, or to assist in the work of the kraal, and had committed adultery.¹⁰

A husband may sue for a dissolution of marriage and return of dowry, when it is clear that his wife will not return to him,^(D)¹¹ or where she has behaved in such a manner as to justify him in refusing to accept her.¹² Thus, where a husband had previously sued several times for the return of his wife or her dowry, the Court said he might have sued for a dissolution of the marriage instead.¹³

A dissolution of marriage and return of dowry may be claimed where the wife is found to have been pregnant by another man at the time of her marriage. ✓

In such a case, on the whole dowry being returned, and no deduction being made therefrom by the woman's guardian for the child, such child does not belong to the husband.¹⁴

The usual course taken by a man whose wife leaves is to sue for her return, or the restoration of her dowry. The summons is addressed to her guardian, and not to the woman herself. Should she then fail to be returned, and her dowry be given back to her husband, marriage is considered dissolved;¹⁵ as is also the case if the order for the return of the woman or her dowry is not complied with.¹⁶ But if the woman returns—even after a writ has been issued against her guardian's property—and is accepted by her husband, marriage is "revived."¹⁷ ✓

If, after judgment for the return of a wife or her dowry, the woman is willing to return, her husband must accept her;¹⁸ and if he does not, he cannot enforce the return of her dowry.¹⁹ ✓

10. *Letele vs. Tuke*, K., 1903. *

11. *Qedi vs. Bobi*, K., 1902. *

12. *Roji vs. Jongola*, B., 1908; H., p. 199.

13. *Qedi vs. Bobi*, *supra*. *

14. *Tabankulu vs. Dyarashe* (Tembus), U., 1909; H., p. 260.

15. *Pohloana vs. Mgqibelo*, K., 1906. *

16. *Mhashe vs. Ndlanga*, U., 1906; W., p. 42; H., p. 112.

17. *Madolo vs. Hoza*, U., 1907; H., p. 157.

18. *Mapango vs. Zuma*, U., 1908; H., p. 207.

19. *Habane vs. Mhabani*, K., 1908.

(D) There is an element of risk in adopting this form of action; for, should the wife be tendered, the husband would be out of court.

Part IV.—*Dissolution: At Wife's Instance.*

In East Griqualand, if a wife deserts her husband, it is considered his duty to endeavour within a reasonable time to persuade her to come back, and, if he fail to do this, marriage is considered as dissolved from the day on which she left him.²⁰ His only remedy then is to enforce return of her dowry.²¹

The Courts of that Province will not permit a husband to gain by his neglect of duty; and will not let him stand aside and allow his wife to "raise seed" to him by other men.²² However, should the husband make repeated efforts to get his wife to return, and thus "keep the case alive," the children born of his wife by other men during that period belong to him. If he does not take these steps, the children are not considered as being his.²³

The Appeal Court, at Kokstad, in upholding these principles of Native law, said: "In the lower Territories it has always been held that, where a woman left her husband with the intention not to return to him, the marriage must be taken as dissolved from the date on which she left him, his redress being against her guardian for the recovery of the cattle which he paid for her."²⁴(E)

This dictum was supported in the case of *Nodange vs. Gcwabe* (K., 1905), in which the Court refused to allow a husband to claim damages for an act of adultery committed after his wife had deserted, and at a time when he apparently did not know where she was.

In another case the same Court said: "It has been held by several Appeal Courts in the Territories that when a wife leaves

20. *Mtuyedwa vs. Tshisa*, F., 1906; H., p. 122. *Juleka vs. Sehlahle*, K., 1905; H., p. 88. *Moeiti vs. Nthako*, K., 1906.*

21. *Pata vs. Mshiywa*, K., 1906.* *Juleka vs. Sehlahle*, K., 1905; H., p. 88.

22. *Pata vs. Mshiywa*, K., 1906.* *Dweba vs. Sam*, K., 1895; H., p. 5.

23. *Juleka vs. Sehlahle*, *supra*.

24. *Moeiti vs. Nthako*, K., 1906.*

(E) The Appeal Courts of the lower Territories, as pointed out later on in this Chapter, have not held the above view, and do not permit of Native marriages being dissolved by a wife's desertion; and seeing that, owing to a change in Chief Magistrates, the Chief Magistrates of the lower Territories now preside over the Appeal Courts of East Griqualand, considerable doubt is felt amongst the jurists of that latter Province as to whether the law in East Griqualand will not be brought into line with that in the other Territories.

her husband with no intention to return to him, and is given in marriage by her guardian, the first marriage must be taken as dissolved from the time she left him; otherwise no end of confusion would arise with regard to the children begotten of the second husband, who probably had married the woman in good faith;^(F) nor would the first husband suffer wrong, as he could claim back his dowry cattle from the father or guardian of his wife.²⁵

In another case²⁶ where the husband came home from work, and found his wife married to another man, who had paid dowry for her, the Court held that the husband's only claim lay for the return of dowry.

Again, where a woman deserted her husband, and he took no steps to follow her up, and she then had children by another man, who thereafter married her, it was held that such children belonged to their natural father, and not to the woman's first husband. The Court gave an emphatic decision in this case,²⁷ holding that a previous conflicting decision²⁸ had been wrongly given owing to bad expert evidence.

In another case²⁹ the Court, while endeavouring to effect a reconciliation between the spouses, who had been long separated, stated that the husband would not be entitled to children born of his wife by other men during his absence from her.

The usual course adopted to ascertain to whom women and their children belong is to sue for a declaration of rights.³⁰ Sum-

25. *Xabanisa vs. Dwayi*, K., 1906. See also *Mavana vs. Debendini*, K., 1907; also Brownlee's notes, MacLean's Compendium, p. 119.

26. *Coko vs. Nondwende*, K., 1907.

27. *Moeiti vs. Nthako*, K., 1906. *

28. *Koti vs. Molongwane*, K., 1905.

29. *Mzanduli vs. Bukwana*, K., 1903. *

30. *Maxobongwana vs. Funda*, K., 1909; H., p. 273.

(F) This ruling prevents all old claims being raked up as to whether children born after a woman has left her husband belong to him or to her own people or to her second husband; for when a native has ill-treated his wife to such an extent as to justify her in going home, he, knowing that, if he brought an action for her return there and then, he would be adjudged to have lost both his wife and dowry, does not infrequently leave everything in abeyance; and when his wife is comfortably settled and has children of another man, he comes forward denying his cruelty, and alleging desertion, in the hope of being awarded the children.

mons is taken out against the one claimant by the other.³¹ The Court awards the women and children to their rightful guardian, but will not order their forcible removal into his custody.^{32 (G)}

The woman herself is not generally sued, but if her relatives are unknown, or do not exist, she herself may be proceeded against.³³

It does not follow that, because a woman has not been residing with her husband for some years, she is not his wife.³⁴ Whether marriage is dissolved depends upon the circumstances under which the parties are living away from each other.

The natives in the Transkei and Tembuland do not recognise a Native marriage as dissolved by reason of the fact that the woman had deserted her husband with the intention of remaining away permanently, even though her guardian, being desirous of terminating the marriage, has unsuccessfully tendered to her husband the restoration of her dowry.^{35 (H)} Until the return of dowry has been actually accepted, the marriage is considered as still existing, and no second marriage by Native forms can be legally contracted with the woman.³⁶ This was held to be so, notwithstanding that the second husband had paid dowry, and married his wife by Native forms, not knowing of her previous nuptials.³⁷

The children born of such second "marriages" belong to the first husband, and not to their natural father.³⁸

These cases are tried under Native law. However, there

31. *Vide* Mabengo vs. Nququ, K., 1905. Ntwapantsi vs. Mazeka, K., 1905. *

32. Mpakanyiswa vs. Ntshangase (Fingos) K., 1897; H., p. 17.

33. *Vide* record in re Mdungazwe vs. Mabacela, K., 1908; H., p. 219.

34. Mfihlo vs. Falani, K., 1905.

35. Mdange vs. Stokwe, U., 1907; H., p. 162.

36. Mgenaka vs. Mditshwa (Tembus), U., 1906; W., p. 30; H., p. 105. Mhlolo vs. Magqadaza, U., W., p. 47. Gqamse vs. Stemele, U., 1906; H., p. 113.

37. Mgenaka vs. Mditshwa (Tembus), U., 1906; W., p. 30; H., p. 105.

38. *Ibid.* Mnyulwa vs. Saliman, U., 1908; H., p. 185.

(G) Acting on instructions in a recent circular, Magistrates are now issuing writs for the restoration of children, provided they are not of tender age.

(H) There seems to be one exception to this custom, for amongst the Gcalekas it is law that, should a wife be withheld from her husband and her dowry tendered in her stead, any child born after her desertion does not belong to him [Pumilomo vs. Mbusi (Gcalekas), B., 1908; H., p. 179].

can be little doubt that the Courts will recognise a marriage under Colonial law with a woman, who, after being married by Native forms, deserts her husband; for it was held that a child born to the parties of such second marriage before it was entered into became legitimatised, and did not belong to the husband of the Native marriage.^{38a} It follows that the former marriage was dissolved by the latter. It could not have been dissolved before the second took place, because the Court awarded damages for adultery against the second husband for causing the woman's pregnancy.^(j) While giving this judgment, the Court said it had no jurisdiction to determine the validity of the second marriage. This was, probably, either because the case came before it on appeal from a magistrate, who would have no jurisdiction to decide the question, or because the case was heard at the time when the Chief Magistrates had been divested of their power to decide divorce suits.

Under Native law, a woman married by Native forms is entitled, upon shewing good and reasonable cause, to have her marriage annulled. This may be arranged between the parties themselves, by return of dowry or some portion of it, but the woman, in order to have this dissolution effected, may, of course, sue her husband; ³⁹ in which case, the magistrate being satisfied that she is entitled to her divorce, determines what portion of the dowry stock must be returned to her husband.⁴⁰

Likewise, should the husband, when he has cattle, neglect to pay further dowry to release his "telekaed" wife, a dissolution of marriage may be claimed at the instance of the wife or her people.⁴¹

Marriage may also be dissolved by the wife's returning home to her people upon good ground, such as gross ill-treatment, in which case her husband loses his right both to her and to her dowry.⁴² In the Transkei and Tembuland a dowry beast would be returned to the husband to mark the dissolution (*see* Chapter III, Part VIII).

38a. *Gqamse vs. Stemele*, U., 1906; H., p. 113.

39. *Mesana vs. Ntshanga*, U., 1897; W., p. 32; H., p. 16.

40. *Nonafu vs. Pike*, B., 1906; H., p. 120; W., p. 25.

41. *Zenzile vs. Rolo*, U., 1909; H., p. 223.
and Chapter i, Part iii.

42. *MacLean's Compendium*, pp. 72, 73. See also Chapter iii, Part viii,

(j) See Chapter i, Part i.

Part V.—*Miscellaneous.*

Should a native marry a wife by Christian rites, or in such a way as to bring the marriage under Colonial law,⁴³ he thereby contracts to keep one wife and one wife only; and should he have connection with any other woman, whether married to him by Native forms or not, then the wife whom he married under Colonial law could claim a divorce on the ground of adultery.⁴⁴ Likewise, a woman married by Native forms may sue for divorce on her husband's marrying another wife by Christian rites.⁴⁵

Amongst the Pondos it sometimes happened that a chief paid the dowry necessary to enable a follower of his to marry. If he thereafter exercised his authority, and took back the stock, the marriage was looked upon as dissolved, provided the husband did not satisfy his father-in-law with further cattle.⁴⁶

43. Sec. 30, Proc. 140 of 1885.

44. Sec. 31, Proc. 140 of 1885.

45. Hlupeko *vs.* Masikinya, K., 1903.*

46. Goxo *vs.* Njivi, U., 1908; H., p. 188.

CHAPTER V.

WIDOWS.

Part I.—*Widow: Legal Relationship to Husband's Kraal; Dowry.*

The duties, obligations and legal position of widows under Native law have been effected by Proclamation to a certain extent.

It was the duty of a widow, according to Native custom, to remain with her late husband's heir or people, with whom she had to bring up her children, and assist in the usual kraal work.

Further, she was expected to "raise up seed" to her "house" by one of her brothers-in-law; but this she could not be compelled to do.

If she failed to perform these various duties, and deserted to her own people, then, according to true Native law, her guardian was liable to return her dowry.

The Appeal Court of East Griqualand supported this custom up to 1902.¹ This Court further held that the fact that the woman had been married to her late husband by Christian rites did not absolve her from her duties.

The Eastern Districts Court, however, in 1891,² refused to uphold the Native custom imposing these obligations upon widows.

The Court held³ that the services of a widow were not one of the considerations for which dowry was paid; that it was not by virtue of the contract of "ukulobolo" that a widow was bound, under Native law, to render such services; but that it was because she, like all other women, was, under that law, a minor; that, as a minor, she was under the guardianship of her

1. *Siyotula vs. Mda*, K., 1902. *Raqa vs. Qawe*, K., 1896; H., p. 14.

2. *Mbono vs. Manoxeni*, E.D.C., 6, p. 62.

3. *Ibid.*

late husband's heir, and, being so, she was bound to obey him; that Proclamations⁴ have now constituted her a major, and for this reason she is no longer obliged to render any services to such heir, but is freed from any restraint he might formerly have been able to place upon her.

In concluding his judgment the learned judge said: "If I am correct, the native contract of marriage is purged of a feature which, although it did not imply slavery, placed a woman in a state of dependence liable to gross abuse."

This difference of opinion between the Native Appeal Court of East Griqualand and the Eastern Districts Court led to a remarkable state of affairs, owing to the fact that formerly an appeal from a judgment of a Magistrate lay to either Court. Hence, if dowry were in dispute by reason of a widow's desertion, the losing litigant in the Magistrate's Court, with whom the choice of the Appellate Court lay, could always ultimately win his case.⁵

The Appeal Courts of Tembuland have adopted the views of the Eastern Districts Courts, and have held that, although it is contrary to true Native law, a dowry cannot now be reclaimed merely because a widow refuses to reside at the kraal of her late husband's people.⁶

Part II.—*Widow: Second Marriage; Effect on First Dowry.*

A widow, being a major, may marry. It is agreed by all Courts that she may do so, notwithstanding any Native custom to the contrary.⁷ The fact that the dowry received from her first husband has not been returned when the second dowry is taken does not shake the validity of her second marriage.⁸

A widow is never given in marriage by her late husband's people.⁹ She marries from the kraal of her father or guardian. This is the custom amongst all Native tribes.¹⁰

4. Proc. 140 of 1885, Sec. 38.

5. *Hamise vs. Mzalunga*, E.D.C., 7, p. 149 (1895).

6. *Mqobora vs. Meslani*, U., 1905; W., p. 35; H., p. 97.

7. *Mbulali vs. Qilo*, U., W., p. 2. *Mqobora vs. Meslani*, U., 1905; W., p. 35; H., p. 97. *Dobeni vs. Baka*, K., 1903; H., p. 58.

8. *Mqobora vs. Meslani*, U., 1905; W., p. 35; H., p. 97. *Rafu vs. Madolo*, B., 1908; H., p. 200.

9. *Bisa vs. Zibukwana*, K., 1905. * *Dobeni vs. Baka*, K., 1903; H., p. 58.

10. *Dobeni vs. Baka*, K., 1903; H., p. 58.

On a widow ^(A) remarrying, her first husband's people can claim back the dowry which had been paid on his marriage,¹¹ on the principle that no guardian can hold two dowries for the same woman;¹² but they cannot claim any right to the dowry paid by her second husband.¹³ This, however, is not Pondo custom, and, amongst natives of that tribe, no return of the first dowry can be claimed in these cases, if there were children born of the first marriage.¹⁴

On the same principle, where a widow married again, and a second dowry had been paid for her by her second husband, and, on his death, she had returned to the kraal of her first husband's people, who had never claimed back the dowry they had paid, it was held that the second husband's heir could recover the dowry paid on the second marriage.¹⁵

The Appeal Court of East Griqualand held that the fact that a widow had married again by Christian rites without the consent of her parents, and without dowry having been paid for her, did not affect the liability of her guardian to return the dowry paid on her first marriage.¹⁶

Notwithstanding the principle that no man may receive two dowries for one woman, it is apparent that in East Griqualand, at any rate, the fact that a husband's heir had driven away his widow would debar such heir from ever claiming back any dowry.¹⁷

Part III.—*Widow's First Dowry: Deductions by Guardian.*

The guardian of a widow is not liable, when she marries again, to return all the dowry he received on her first marriage.

In East Griqualand, the number of head of cattle that may be deducted is one for each child born.¹⁸ If the number of

11. Lutweni *vs.* Vava, K., 1904. Namse *vs.* Ndatana, U., 1907; H., p. 134.

12. Mqobora *vs.* Meslani, U., 1905; W., p. 35; H., p. 97.

13. Namse *vs.* Ndatana, U., 1907; H., p. 134.

14. Mdodana *vs.* Ndwabuze (Pondos), U., 1900; H., p. 35. Goxo *vs.* Njivi (Pondos), U., 1908; H., p. 188.

15. Gwente *vs.* Smayili, B., 1904; W., p. 18; H., p. 71.

16. Ma'Awa *vs.* Maganekehle, K., 1907; H., p. 167.

17. Mapura *vs.* Aulia, K., 1906.

18. Lutweni *vs.* Vava, K., 1904.

(A) The word "widow" used here does not mean a divorced woman whose first husband is dead.

children exceed the number of cattle, no return of dowry can be claimed.¹⁹ In cases where the deceased husband's people neglect for a long period to claim his widow, and she remains with her own people, her guardian may deduct further cattle for her maintenance.²⁰ In the case quoted, two head were allowed to be deducted.

In the Transkei and Tembuland, it is customary not to restore more than half a dowry to the first husband's heir.²¹ In the first case quoted, three head of cattle were ordered to be returned out of a dowry of eight head. The woman had lived fourteen years with her husband, but had had no children by him. In the case of *Lobi vs. Noyo*, the dowry (six head) was halved. The wife in this instance had lived only one month with her husband, and there were no children born of the marriage.

Part IV.—*Widow's Rights to Property Earned.*

In regard to the rights of widows over property earned by them after their husband's death, the strict Native law is set forth in the case of *Mapura vs. Aulia* (K., 1906).

In that case the Court held that, according to custom, a widow has the right to the possession, and use, of such stock and its progeny; but that, being under the guardianship of her deceased husband's people, she cannot remove the stock from their kraal without their consent, unless she has been ill-treated or her life has been made miserable by constant quarrelling or the like, in which case it is competent for the Court to remove her and her property to the guardianship of another man.

Although this is strict custom, the same Court, later on, refused to support it.²² It was held that Proclamations fix the age of majority of both males and females at twenty-one years of age; that it therefore follows that, by the death of the husband, his widow is freed from tutelage and control, can acquire property in her own right, and is entitled to the unfettered use of her earnings.

19. *Deleki vs. Bango*, K., 1905. *

20. *Lutweni vs. Vava*, K., 1904.

21. *Gwente vs. Smayili*, B., 1904; W., p. 18; H., p. 71. *Nanto vs. Mgoxoto*, B., W., p. 17. *Lobi vs. Noyo*, B., 1909; H., p. 269.

22. *Malakabe vs. Malakabe*, K., 1908.

The Courts, at Butterworth,²³ and Umtata,²⁴ have also refused to uphold strict Native law relating to widow's earnings, as "being repugnant to justice and equity, and to the special provisions in the Proclamation."

It will be seen that these decisions are in accordance with the judgment of the Eastern Districts Court, in the case of *Mbono vs. Manoxweni* (E. D. C., 1891).

Part V.—*Widow: Liability of Husband's Heir for Debts of.*

It has been held that a widow, since she is a major, may sue or be sued without assistance;²⁵ and that her position is precisely the same as that of a European widow.²⁶

The Court, in the last case quoted, refused to hold a widow's guardian liable on a contract made between her and the plaintiff, there being no privity of contract between guardian and plaintiff.

Part VI.—*Widow: "Ngena Custom."*

When a widow remains with her late husband's people, she is sometimes "ngenaed" to one of his relatives. By this it is meant that she is given to this relative to wife. A ceremony is gone through, at which relatives are present, and an animal is slaughtered "to cleanse the utensils."²⁷ She then has the privileges, status and responsibilities of a wife.²⁸

The custom of "uku-ngena" originated at a time when there was a preponderance of females over males, owing to tribal wars, etc. The object of it is to keep the same descent, or blood, in the children of the women of the kraal.²⁹

The Basuto custom of "uku-ngena" does not materially differ from that of other tribes.³⁰

23. *Sintenteni vs. Nolanti*, B., 1901; W., p. 38; H., p. 43.

24. *Nosaiti vs. Xangati*, U., 1902; H., p. 50.

25. *Mantambo vs. Dana*, K., 1908. *Nosentyi vs. Makonzo*, B., 1900; H., p. 37.

26. *Sibanda vs. Sibanda*, K., 1909.

27. *Mxogwana vs. Tshaka*, K., 1906*; *Manyosine vs. Nonkanyezi*, U., 1906; H., p. 114.

28. *Thakudi vs. Jacob*, K., 1905.

29. *Nonkanyesa vs. Mosani*, U., 1906; W., p. 45; or *Manyosine vs. Nonkanyezi*, *supra*.

30. *Cheka vs. Cheka*, K., 1905.

The custom is practised by Fingos, Bacas, Pondos, Basutos, Hlangwenis, Hlubis and other native tribes.³¹

The "ngenaing" man merely does the services of a husband in "raising seed." His duties practically end there. The administration of the estate of the late husband, and the guardianship of his widow and her children fall to the lot of his heir. She is still looked upon as the deceased man's wife.

A widow cannot be forced to become "ngenaed," and must be a willing party to the arrangement.³²

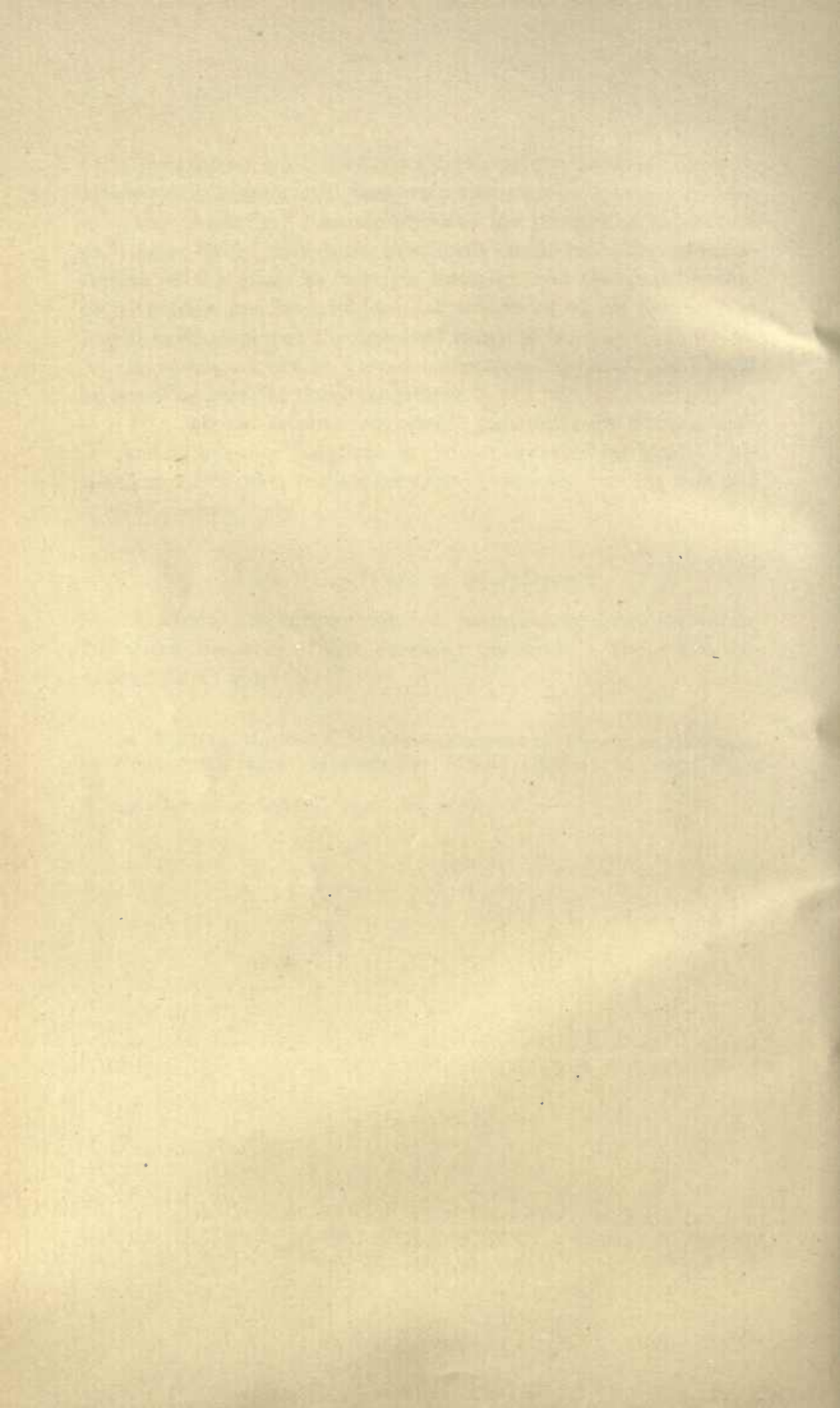
If a woman is not "ngenaed," sometimes an outside man is taken by her as a "seed raiser" to her deceased husband. This man cannot be sued for adultery, and enters the hut for that one specific purpose only.

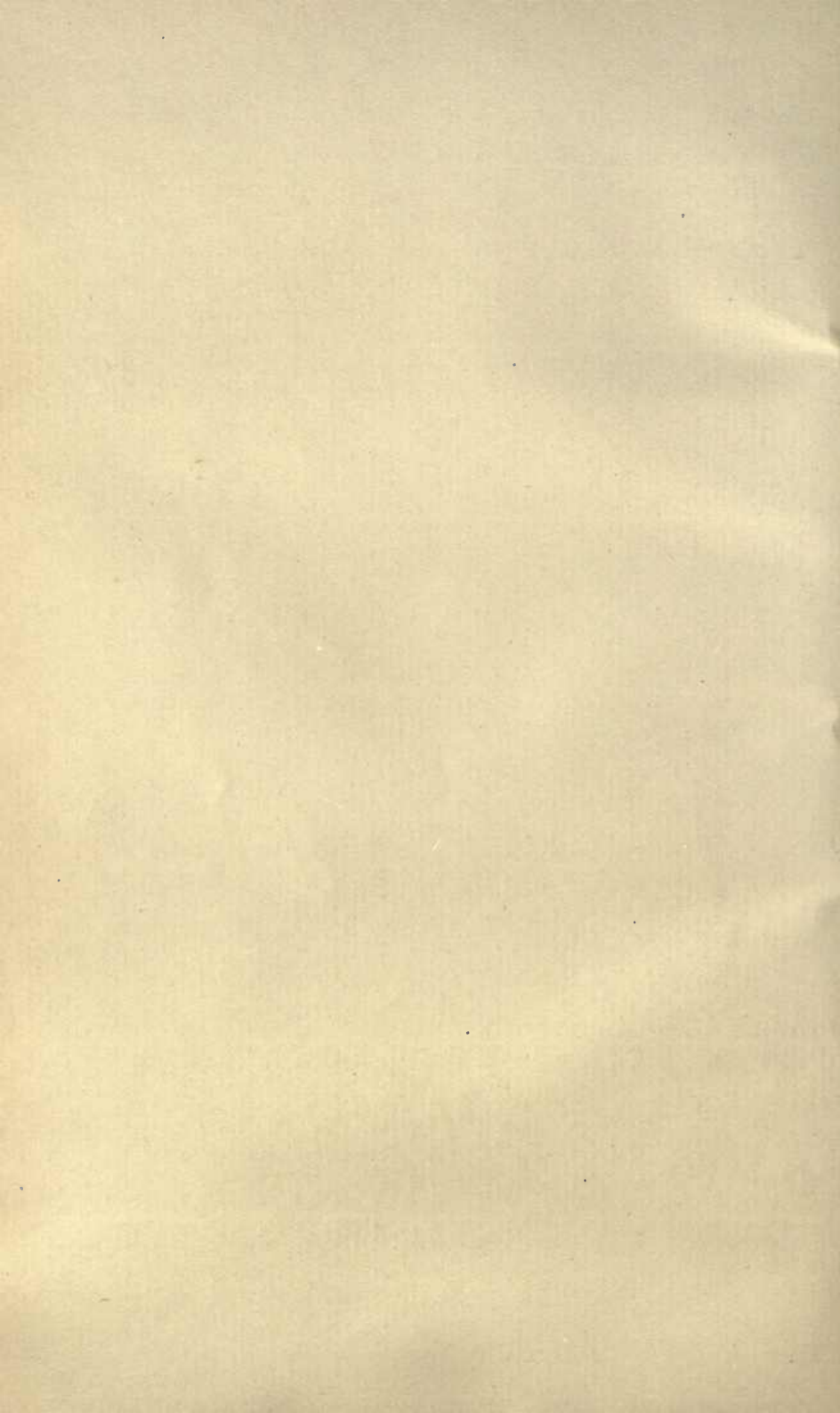
Part VII.—*Widows: Maintenance.*

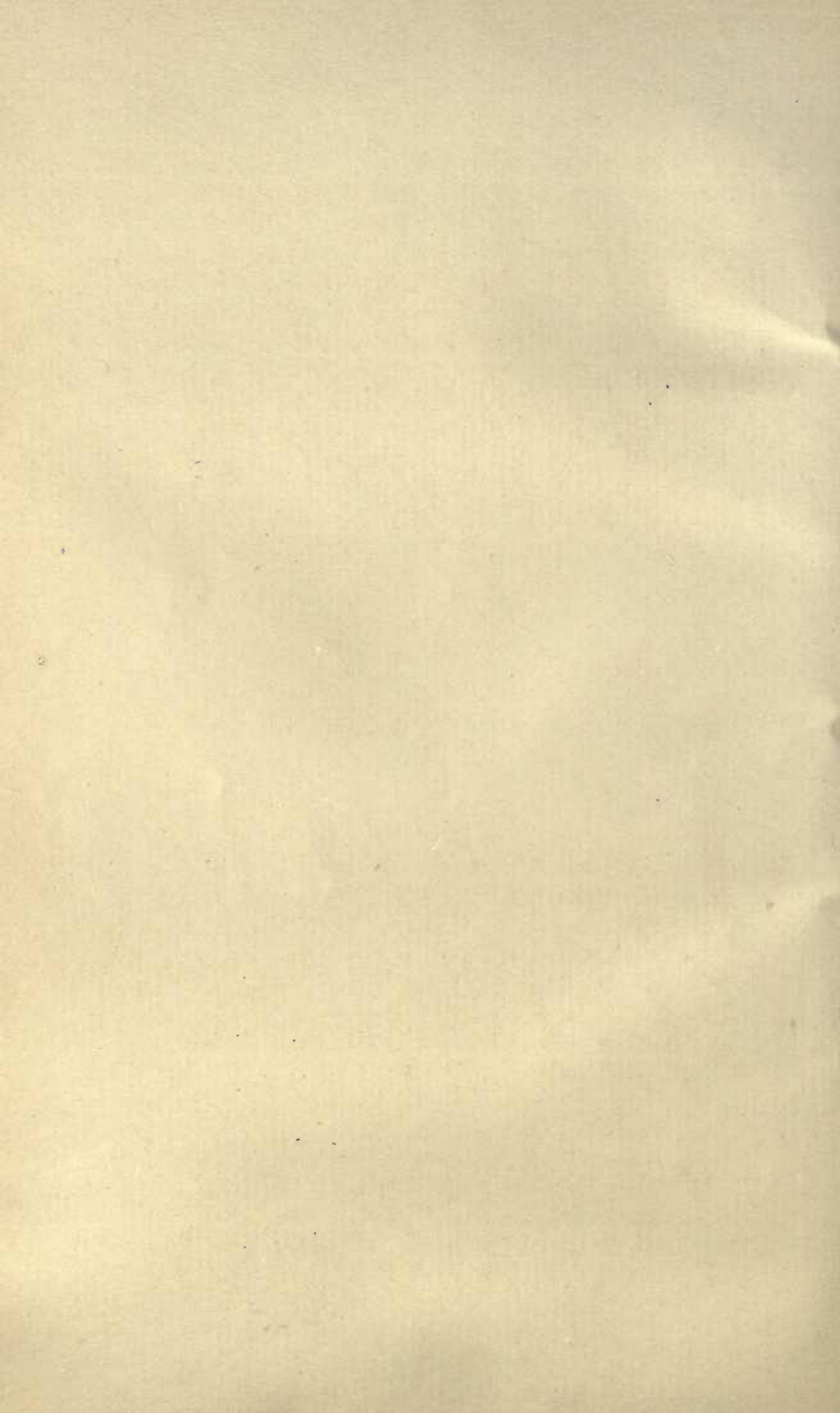
A widow has certain rights to maintenance from the estate and from the heir of her deceased husband. These are explained in Chapter XIII.

31. Matia *vs.* Moalosi, K., 1906*; Nonkanyesa *vs.* Mesani, or Manyosine *vs.* Nonkanwesi, *supra.* Mgabadeli *vs.* Mcitiki (Hlubis), K., 1903; H., p. 69.

32. Dobeni *vs.* Baka K., 1903; H., p. 58.







CHAPTER VI.

RIGHTS, LIABILITIES AND DUTIES OF A HEAD OF A KRAAL.

Part I.—*Kraal-Head Liability: to Whom it Attaches; General.*

The head of a kraal is responsible, to some extent, under Native law, for the acts, torts, and debts of the members of his kraal.

As to whether he will be held liable in a Court of law depends in the first place under what law the case is tried.

There is no such thing in Colonial law as kraal-head liability, and a kraal-head in the Colony proper is relieved of the responsibility imposed upon him under Native law.¹

Proclamations² permit of suits between natives being tried under either Native or Colonial law, and it is within the judicial discretion of the magistrates to select the law under which cases coming before them are to be tried. If, therefore, the Court decides that the case be tried under Colonial law, no action based on kraal-head liability lies; and the case is at once disposed of. On the other hand, if the Court elects to proceed under Native law, the case is gone into on its merits.

As to what cases are tried under these different sets of laws, it may be broadly stated that those in which the defendant kraal-heads are natives who have adhered to their aboriginal customs in whole or in part are tried under Native law; whilst those in which the Defendants have turned Christian, and have adopted civilised habits, and brought up their children according to European ideas, are dealt with under Colonial law.³ Where the defendants plead that they have abandoned their native habits, the onus is upon them to prove it.

1. *Ncontsi vs. Nolemi*, 19 J., p. 417.

2. Proc. 111 of 1879, Sec. 23.

3. *Mboniswa vs. Gasa*, U., 1909; H., p. 264. *Tumane vs. Smayile*, U., 1908; H., p. 207.

There are only two cases reported wherein the defendants have avoided kraal-head responsibility by having adopted European habits.

In the first case,⁴ the evidence shewed that plaintiff's daughter had been seduced by defendant's son. The Defendant was a deacon of the Church of England, who had been married by that Church. The seducer was a major son of that marriage, who had received a good education from his father, and was earning his living as a teacher. The seduction took place while he was living away from his father's home. Apart from the point at issue, the Court remarked that it was doubtful, under the circumstances disclosed, if the father was liable under Native law.

In the second case,⁵ both parties to the suit had abandoned Native customs, and had adopted Christianity and civilised ways. The Defendant kraal-head resided on his own farm, and not in a location. The tort-feasor was a major, living with his father.

Part II.—*Tembuland and Transkei: Native Law.*

The position of a head of a kraal in Tembuland and the Transkei under Native custom has been fully described by the Appeal Courts of those Provinces in the following decisions:—

It was held⁶ that the head of a kraal is responsible for the penalties incurred by its members, provided they are not able to satisfy the judgment; that the head of the kraal is liable, irrespective of any degree of relationship between himself and the members; that the fact that such members are married men with families of their own does not affect the question of kraal-head liability, which exists until their inmates set up kraals of their own.

Again, it was held⁷ that a father is liable for the torts of his married sons resident at his kraal, even though he may have supplied them with wives by providing the necessary dowries.⁸

4. *Mboniswa vs. Gasa*, U., 1909; H., p. 264.

5. *Tumane vs. Smayile*, U., 1908; H., p. 207.

6. *Class (Klaas) vs. Mgqweqwe*, B., 1897; W., p. 5; H., p. 19.

7. *Daniso vs. Makinana*, B., 1905; W., p. 21; H., p. 86.

8. It may be noted that Col. Stanford, in his expert evidence in the case of *Sekeleni vs. Sekeleni* (J. 21, p. 118), which was a case between natives living in Tembuland, stated that a father's liability for his son's torts ceased upon the latter's marrying or being publicly disinherited by his father.

Again, it was held⁹ that the head of a kraal is liable for the torts of its members, as the law presumes that he will exercise proper supervision over them; and that, when a member leaves, and opens a distinct kraal of his own, the liability for his acts ceases.

Again, it was held¹⁰ that the liability of a head of a kraal extends to the torts of members of his family, and to persons living at his kraal, so long as they are *bona fide* residents of the same.

Again, it was held¹¹ that a father is liable for the torts and debts of his son until such son has founded a separate establishment of his own distinct from that of his father,¹² or until his father has publicly repudiated him.

It may be here mentioned that native assessors state¹³ that a kraal-head is liable for the debts and torts of both major and minor inmates of his kraal; and that this responsibility extends to obligations contracted prior to the inmates taking up their abode at the kraal; the reason for this being that the kraal-head profits by all the stock brought by incoming residents.

In another case¹⁴ the Court said: "The position of a head of a kraal. . . . is not that of a wrong-doer, but, rather, that of a surety responsible for the good behaviour of the members of his kraal." An application for the dismissal of the action, on the ground that the tort-feasor was married—although a member of defendant's kraal—was refused.

Part II.—*East Griqualand: Native Law.*

In East Griqualand, although the kraal-head is liable, under Native law, for the acts and debts of the members of his kraal, he is not responsible in all cases, as in Tembuland and the Transkei.

The following decisions describe his liability in East Griqualand:—

It was held¹⁵ that the mere fact that a son resided at his

9. *Sajani vs. Fikeni*, U., ; W., p. 42.

10. *Bovi vs. Mgqitipi*, B., ; W., p. 27.

11. *John vs. Bangani*, B., ; W., p. 4.

12. A father has the right under native custom to eject his major sons from his kraal (*Mkeqo vs. Matikita*, U., 1909; H., p. 242).

13. *Sifuba vs. Mbaswana*, U., 1909; H., p. 222.

14. *Rubulana vs. Tangana*, U., 1905; H., p. 90.

15. *Mabuyane vs. Zake*, K., 1903.*

father's kraal did not make the latter liable for all his son's debts; and that, where a son contracts liability to pay a dowry for his second wife while he is resident at his father's kraal, his father is not liable to pay it.

Again, it was held¹⁶ that a father is not responsible for a debt (money lent) due by his son, when such debt has been contracted without his consent while the son was resident at his kraal.

Again, it was held¹⁷ that, where a man had seduced a woman while staying for a short time as a visitor at the kraal of another native, no liability attached to the latter.

In another case¹⁸ the facts shewed that a relative had brought up a boy, owing to his mother being unable to rear him; that this boy returned home after arriving at the age of circumcision; that thereafter, when again visiting his relative's kraal, he seduced a woman, and incurred liability for a fine. It was held that his relative was not liable for the tort, although he had given a horse towards the fine.

Again, it was held¹⁹ that responsibility attached to the head of a kraal for the acts of his visitor, where the latter had taken up his abode with him in such a way as to be considered by the neighbours to be making his home there.

Again, it was held²⁰ that a father, jointly sued with his major son, was liable for the act of the latter, who had caused the malicious imprisonment of the Plaintiff. The Court said that, as the son was a bachelor, and a resident of his father's home, his parent was liable for the damages incurred.

Again, it was held²¹ that a father could not escape liability for the acts of his minor son merely because such son was in service. The Court said that the son was still an inmate of his father's kraal.

Again, it was held²² that an eldest brother is liable, on the death of his father, for the torts of his younger brothers, while the latter are staying at his (the elder brother's) kraal; for

16. *Amos vs. Morai, K.*, 1906.*

17. *Homans vs. Mangosa, K.*, 1906.*

18. *Kudede vs. Dioto, K.*, 1905.

19. *Mehlomane vs. Nkwatsha, K.*, 1900; H., p. 33.

20. *Mbikwana vs. Xana, K.*, 1906.

21. *Makwenkwe vs. Japi, K.*, 1909.

22. *Mkungwana vs. Bizana, K.*, 1909. *Gunyani vs. Modesani (Basutos), K.*, 1909; H., p. 255.

the reason that he is heir of his deceased father, and, as such, guardian of his younger brothers; further, that when a father (or elder brother) has paid dowry for his son's (or younger brother's) wife, he is released from liability.

In another case²³ the Court said that the laws and customs of the tribes of East Griqualand differ in some respects from those of the tribes resident elsewhere, and that a father is not liable there for the torts of his married sons.

Again, it was held²⁴ that a father is liable for his major son's torts while the latter resides at his kraal.

Thus, the law as in force in East Griqualand may be summarised as follows:—The head of a kraal is liable for the debts of his sons and wards, when contracted with his knowledge and consent, but not otherwise. He is liable for the torts of his sons, whether majors or minors, while they are resident at his kraal. When the sons marry, his liability ceases. He is not responsible for the torts of his *bona fide* visitors.

Part IV.—*Nature of Kraal-Head Liability: Native Law; Actions.*

A final judgment cannot be obtained against the head of a kraal, sued jointly with the member primarily liable, when a provisional judgment only can be obtained against the latter. Thus, where a guardian was sued jointly with his ward (who was in default), and final judgment was given against the appearing guardian, but provisional judgment only against the absent ward, the Appeal Court altered the judgment against the guardian to a provisional one. In doing so, the Court said: "The liability of the head of a kraal under Native custom for the torts committed by members of his kraal has no parallel in Colonial law.²⁵ It is not precisely of the same nature as an act of suretyship, as it is involuntary on his part; nor is he in the position of a joint tort-feasor.²⁶ It does not come into effect until judgment is obtained against the individual who committed the tort;²⁷ consequently, as his liability is a con-

23. *Sinxoto vs. Sinekisi*, K., 1908.

24. *Nongalaza vs. Nyilwana*, K., 1908.

25. See also *Nteteni vs. Nkohla*, U., 1908; H., p. 172.

26. *Ibid.*

27. See also *Matsabisa vs. Phoorie* (Basutos), K., 1895; H., p. 6.

tingent one by the judgment of the Court, he should not be placed in a worse position than the principal Defendant."²⁸

In two interpleader cases it was held that the property of the head of a kraal cannot be attached for the debts of its inmates upon a judgment against the latter only;²⁹ but that the kraal-head himself must be sued, in order that an opportunity might be afforded him of setting up any defences of which he might be able to avail himself;^{30(A)} and that the inmate should be ex-cussed before the property of the kraal-head is attached.³¹

A kraal-head who has been sued after judgment has been obtained against the tort-feasor cannot escape liability on the ground that an action against one tort-feasor is a bar to further action against others.³²

It is, however, now essential that he should be sued at the same time as the inmate; and, if a Plaintiff elects to sue the inmate only, he cannot, by a subsequent action against the kraal-head, seek to make him liable for the former judgment.^{33(B)} However, a kraal-head, who has been sued with an inmate, and who has alone been absolved from the instance (judgment being taken against the inmate), may be used afresh under Sec. 32, Schedule B. of Act 20 of 1856.³⁴

Part V.—*Kraal-Head: Rights over Inmates' Property.*

By reason of the fact that the head of a kraal is liable for the acts and torts of its members, he is considered, according to pure Native law, to have full control over their property, which, in some instances, could be attached for his debts. This custom has been adhered to by the Courts of East Griqualand. Thus, where a son's stock was taken in execution in that Pro-

28. *Nongalaza vs. Nyilwana*, K., 1908.

29. *John vs. Bangani*, B., ; W., p. 4. *Dliso vs. Mafa*, K., 1903.

30. *John vs. Bangani*, B., ; W., p. 4. *Dliso vs. Mafa*, K., 1903.

31. *Dliso vs. Mafa*, K., 1903.

32. *John vs. Bangani*, B., ; W., p. 4.

33. *Rubulana vs. Tungana*, U., 1905; H., p. 90. *Mfanyana vs. Mbesi*, B., 1909; H., p. 234.

34. *Nteteni vs. Nkohla*, U., 1908; H., p. 172. *Mfanyana vs. Mbesi*, B., 1909; H., p. 234.

(A) *Klass vs. Mqweqwe*, 1897; H., p. 19, is thus partly overruled.

(B) *Bovi vs. Mgqitipi* (B., W., p. 27) and *John vs. Bangani* (B., ; W., p. 4) are thus partly overruled. This point does not seem to have been raised in East Griqualand. See *Gunyani vs. Modesane* (K., 1909; H., p. 255).

vince for a debt due by his father, the Court held that it was executable, for the reason stated above.³⁵

However, the same Court held³⁶ that there are certain cases in which a father is not entitled to the earnings of his sons.^(c) In the case quoted, a father was being sued by his minor son for certain cattle earned by the latter. The case was sent back to be tried on its merits.

It is customary amongst certain tribes for bachelors to consider themselves in the position of minor wards of their fathers. They pay all their earnings, or some part thereof, to their fathers, and look to them, in return, for the dowries for their first wives. If their fathers fail to fulfil their share of this quasi-contract, they may be sued by the sons for the necessary stock to enable them to pay for their wives.³⁷ This liability extends to the father's heir, whose duty it is, amongst other things, to help to provide his younger brothers with wives, by assisting them in the payment of dowry.³⁸

On cattle being handed to a son by his father for the purpose of paying dowry, he cannot use them for any other object; and should he do so, his father may sue him for their return.³⁹

The Courts of the Transkei do not hold that a major son's stock is executable for the debts of his father. These Courts, while admitting the Native custom to be as previously stated, held that this custom conflicted with Sec. 39 of Procs. 110 and 112 of 1879, which provides that the majority of both males and females is reached on such persons arriving at twenty-one years of age.⁴⁰ For this reason the Court said that a father, or a head of a kraal, has no legal right to the property of major members of his kraal.

Thus, it will be seen that in East Griqualand an unmarried major son's property is executable, in some cases, for his father's debts; whilst in the Transkei this is never the case.^(d)

35. *Moyo vs. Kemshe, K.*, 1902.*

36. *Ntliziombi vs. Mbeinbe, K.*, 1903.

37. *Mayeza vs. Ntshontsho, K.*, 1905.*

38. *Daniso vs. Mzingele, F.* 1903; *H.*, p. 67.

39. *Mayeza vs. Ntshontsho, K.*, 1905.*

40. *Jakeni vs. Mbelo, B.*, ; *W.*, p. 19. *Mfanekiso vs. Mpakana, B.*, 1904; *H.*, p. 85.

(c) Each of these cases would have to be tried on its own merits, and would be governed by equity rather than by hard-and-fast rules.

(d) Sec. 39, Proc. 110 of 1879 fixes the age of majority at twenty-one years for both male and female natives. On reaching that age natives

Part VI.—Kraal-Heads: Powers over their Wives and Women.

During the lifetime of their husbands, wives are looked upon as minors, and have no *legitima persona standi in judicio*; and thus cannot sue or defend actions against third parties without assistance,⁴¹ unless their case falls under Sec. 51, Act 20 of 1856.⁴² They can, however, sue their husbands for divorce without any assistance. A wife may also sue her husband, without assistance, when he is making improper disposition of the property belonging to her house.⁴³ In the same way, she may be sued, without assistance, by her husband.⁴⁴

The property earned by a wife during her husband's lifetime belongs to him,⁴⁵ and she can lay no claim to it, even if he thereafter drives her away.⁴⁶ However, while she is with him, such property is considered as belonging to her "house," which

41. Hlupeko *vs.* Masekinya, K., 1903.*

42. See also Nosentyi *vs.* Makonza, B., 1900; H., p. 37. Noseki *vs.* Fubesi, B., 1900; H., p. 36.

43. Noseki *vs.* Fubesi, B., 1900; H., p. 36. Noseki *vs.* Tini, B., W., p. 7.

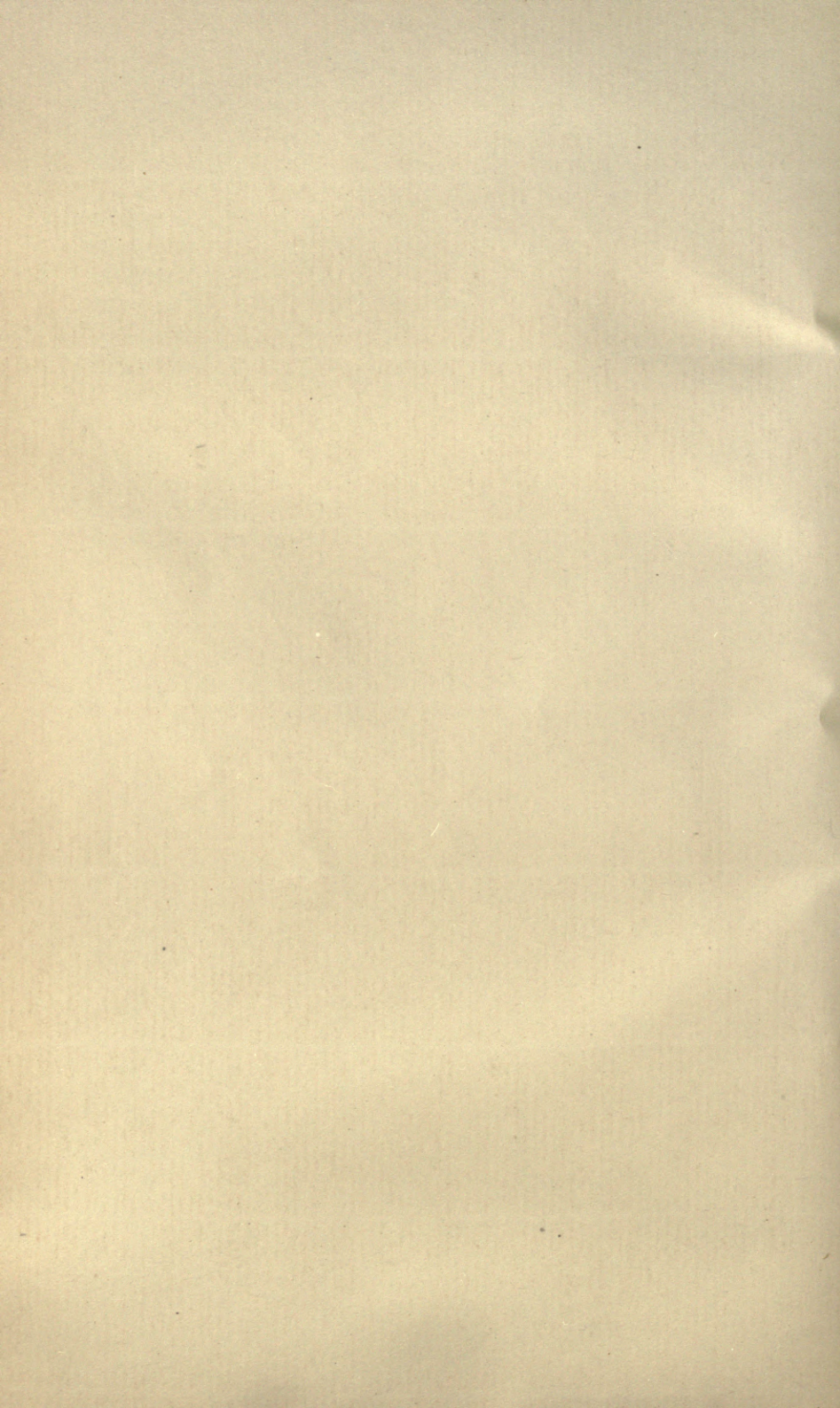
44. Mkataza *vs.* Mkataza, K., 1909; H., p. 270.

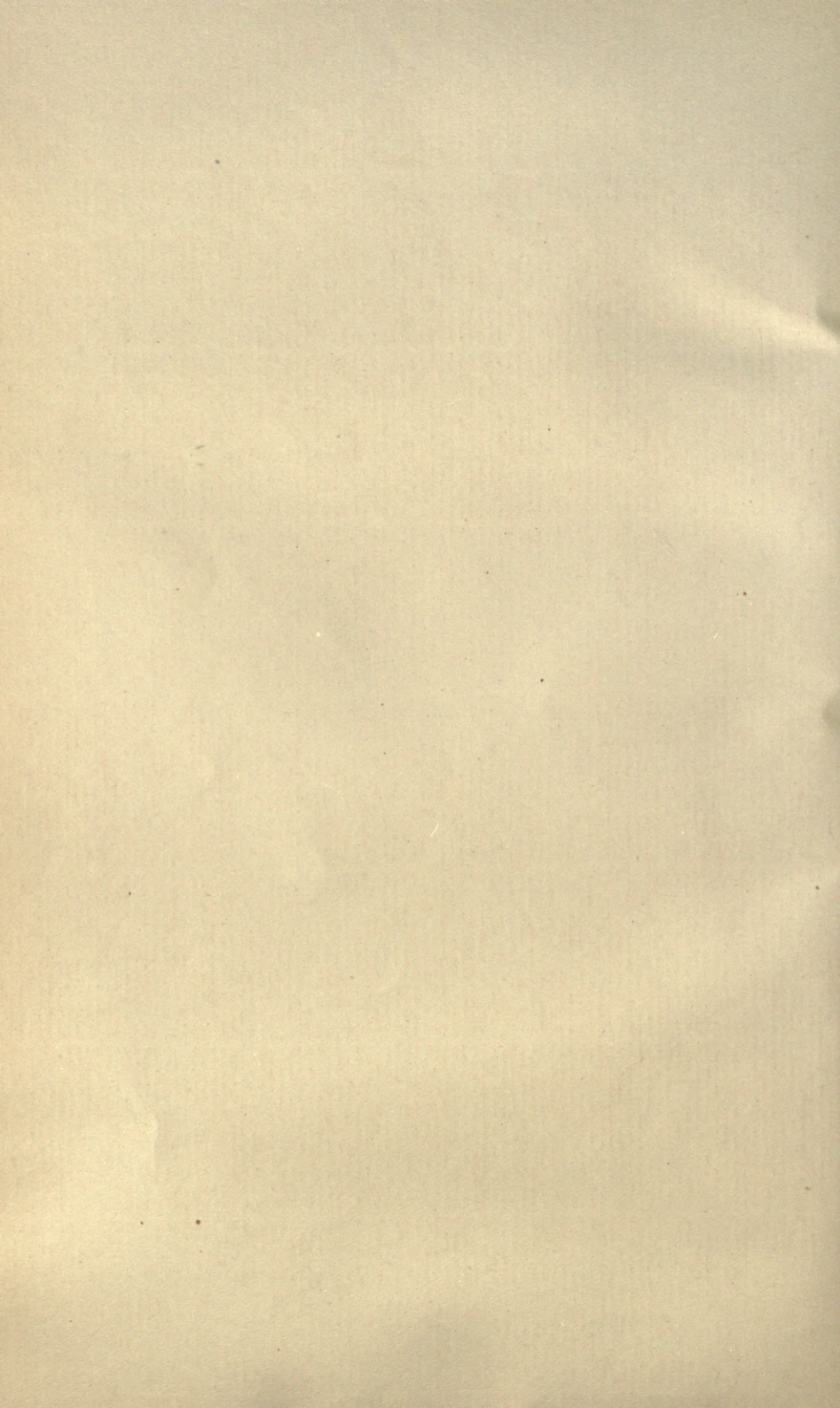
45. Nosenti *vs.* Mlindini, B.; W., p. 24. Sixakwe *vs.* Nonjoli, U., 1896; H., p. 11.

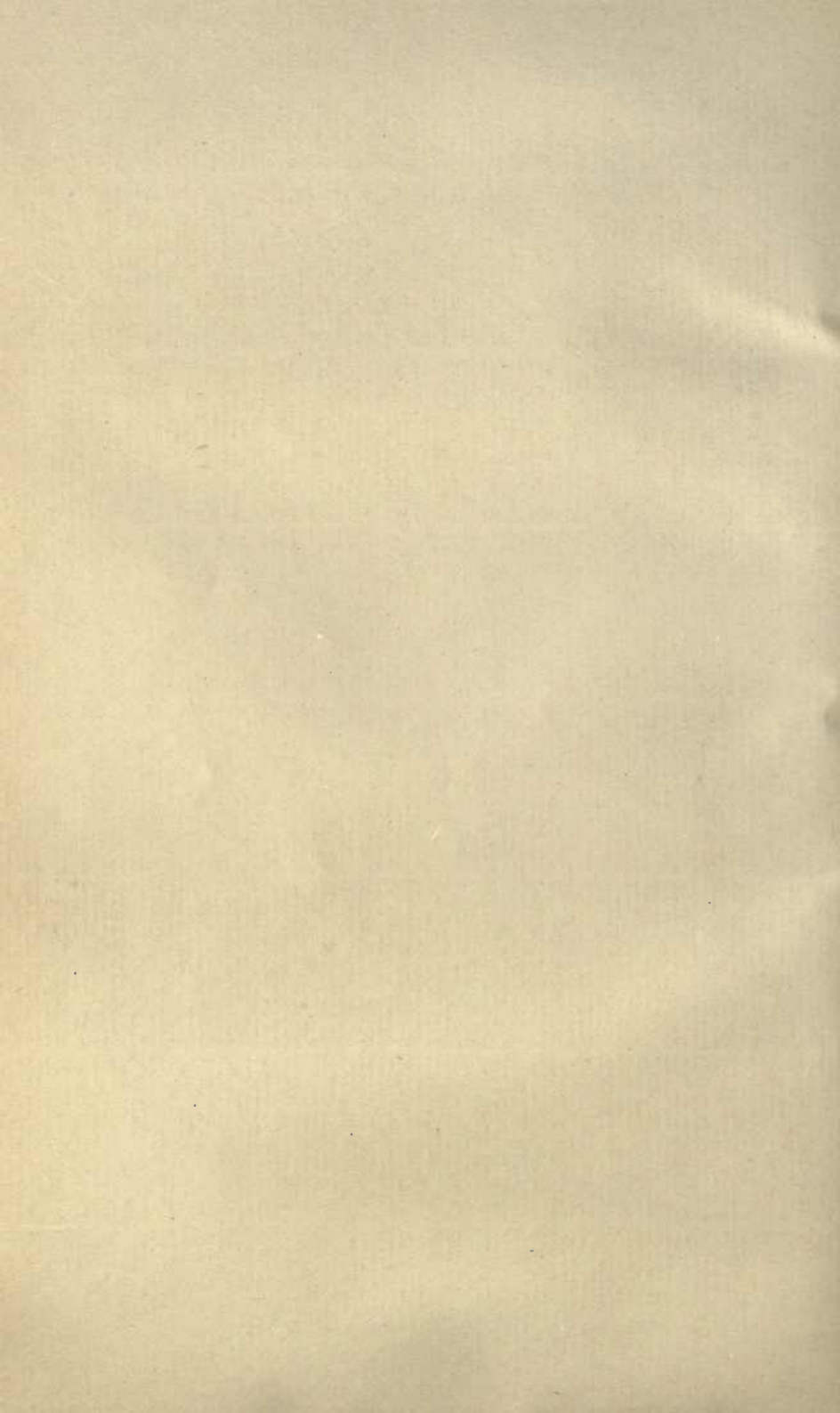
46. Nosenti *vs.* Mlindini, B.; W., p. 24.

are entitled to all the privileges appertaining to majors. Widows are therefore held, in the Transkeian Courts, to be no longer under the tutelage of their late husband's heirs, as hitherto. They are allowed to consider themselves entitled to all the privileges of widows in the Colony proper. Similarly, major sons of a kraal are placed by these Courts out of the tutelage and control of their father. They are freed from his guardianship, and cannot be compelled to obey him. A father, or kraal-head, has, therefore, been absolutely deprived of all his authority over these sons; and his former power over them has been removed. Proclamation having thus brought the status of all natives in the Territories to the same level as that of natives in the Colony proper in point of individuality, it is difficult to understand why the kraal-head should not be correspondingly relieved of responsibility under Native law for misdeeds of members of his kraal, once they have attained majority.

In the past, when a father had control over his sons, and could dispose of their property, no very great injustice could be said to have been done if he was made responsible for their actions; but, as shewn above, the Courts have now removed major sons out of his control, and their stock is not executable for his debts; and thus, while depriving a father of his power over his sons, the Courts have still held him liable for their actions.







fact would necessitate her being consulted before it could be disposed of.⁴⁷

The earnings of a woman-doctor after her marriage does not form an exception to this rule, even though her own people may have disbursed for her initiation into the "profession."⁴⁸ These expenses should be taken into account at the time her dowry is being fixed.⁴⁹

The Appeal Court at Kokstad, however, stated that under certain circumstances a wife, according to the customs of natives in the Province of East Griqualand, may hold stock earned by her, especially when she has been abandoned by her husband,⁵⁰ but no example was given.

A wife has the right to claim maintenance from her husband so long as she is an inmate of his kraal, or of a kraal pointed out by him. If she leaves him, she cannot compel him to support her, but must live on the dowry he paid to her guardian.⁵¹

It has been explained in Chapter I that a native may legally marry more than one wife at a time. One of these women is styled the "great wife," or "the wife of the principal house." She ranks above all other wives.⁵²

Amongst most tribes, including the Pondos,⁵³ she is the first wife married. In some tribes, the next woman in rank is called the "right-hand wife." Amongst the Pondos she is styled "Ikohlo."⁵⁴

The third wife, amongst some tribes, is styled the "left-hand wife."

Any additional wives (save the wife of the "ixiba' house") are placed in separate "houses" attached to one or other of the three higher "houses."⁵⁵

Amongst the Pondos, the third wife married is styled the "isitembu" to the "great house," and the fourth wife is styled the "isitembu" to the "kohlo' house."⁵⁶

47. Sixakwe *vs.* Nonjoli, U., 1896; H., p. 11.

48. *Ibid.*

49. *Ibid.*

50. Malunga *vs.* Sihlwai, K., 1907.

51. Ngejana *vs.* Qwane, K., 1905.*

52. MacLean's Compendium, B., 73.

53. Tsweleni *vs.* Nyila (Pondos), F., 1909; H., p. 256.

54. *Ibid.*

55. MacLean's Compendium, p. 74.

56. Tsweleni *vs.* Nyila (Pondos), F., 1909; H., p. 256.

Amongst other tribes, the minor wives are styled "qadis." The first "qadi" takes the rank of "qadi" to the "great house,"⁵⁷ the second takes the rank of "qadi" to the "'right-hand' house," and so on. It is contrary to custom to appoint a "qadi" to the "'right-hand' house" before there is a "qadi" attached to the "great house."⁵⁸

Should a wife die without leaving male issue, but not otherwise,⁵⁹ another woman may be married to fill her position. This woman takes the rank of the deceased, and the children of both women are looked upon as brothers and sisters of full blood.⁶⁰ Should such second marriage take place when the deceased woman has left an heir, the second wife ranks as a "qadi" to the deceased's "house";⁶¹ and even if she were, in defiance of custom, actually given the rank of the deceased wife, the husband could not thereafter be prevented from reducing her to the status of "qadi."⁶²

Sometimes it happens that a "great wife," or other major wife, is not blessed with children. In these cases another woman is placed in her "house" with the sole object of "raising seed" to it. The children resulting are looked upon as children of the establishment in which their mother was "placed," and are in the same position as if born of the major wife. The woman, so brought in to "raise seed," does not take the rank of the major wife. For instance, if she were placed in the "great house," she could not claim the title of "great wife." She may be called "qadi," or "isitembu"⁶³ to it. But, on the other hand, a woman may be placed in a "house" to "raise seed," without being given the rank of "qadi";⁶⁴ in fact, she is generally of no rank.

Besides the wives mentioned above, there is in some tribes a wife of the "'ixiba' house." This is an independent establishment apart from all others. The dowry of this wife is paid by

57. See facts in *Mgcinwa vs. Sinxoto*, K., 1905.

58. *Peko vs. Matanzima*, B., 1903; H., p. 60.

59. *Kobesi vs. Maqukango*, B., 1906; W., p. 29; H., p. 128.

60. *Tsweleni vs. Nyila* (Pondos), F., 1909; H., p. 256. *Kobesi vs. Maqukango*, B., 1906; W., p. 29; H., p. 128.

61. *Kobesi vs. Maqukango*, B., 1906; W., p. 29; H., p. 128.

62. *Ibid.*

63. *Peko vs. Matanzima*, B., 1903; H., p. 60. *Tsweleni vs. Nyila* (Pondos), F., 1909; H., p. 256. *Nosenti vs. Sotewu* (Fingos), B. 1906; W., p. 27; H., p. 117.

64. *Nosenti vs. Sotewu* (Fingos), B., 1906; W., p. 27; H., p. 117.

her husband's father; and her "house" is not under the control of, or subordinate to, the major "houses." It is seldom found outside families of rank.⁶⁵

A native has the right to claim his unmarried daughters, and wards of his kraal, from anyone withholding them. Thus, where a widow married again, and took her children (which belonged to her first husband's heir) with her, it was held that both she and her second husband were liable for their return.⁶⁶

A father's rights over his daughter, when she has been married by Native custom by some unauthorised person, are dealt with in Chapter III., Part IX.

A native had the right to follow up his daughter, if stolen by a hostile tribe; and if she had been given in marriage by them, and had then had children, he was entitled to abduct them all, leaving the man who had paid dowry to her captors to reclaim it from them.⁶⁷

Part VII.—*Custodian of Kraal in Head's Absence.*

During the absence from home of the kraal-head, his heir takes charge of his family, and conducts his legal proceedings.⁶⁸

It is also competent for a woman, during such absence, to protect the property of the kraal to which she belongs, more especially in regard to the cattle paid to her guardian as dowry for herself.⁶⁹

In the case last quoted, the Court permitted a woman (in the absence of her brother and guardian) to bring such an action against a native, who, she alleged, had no right to control her brother's estate, and who was illegally disposing of it.

65. *Jonginambo vs. Jonginambo*, U., 1906; W., p. 34; H., p. 104.

66. *Tshimsela vs. Stoffel*, K., 1906.

67. *Tyipana vs. Ncitshe*, K., 1906.

68. *Mphatsua vs. August*, K., 1905.

69. *Mahlentle vs. Pangiwe*, K. 1909.

CHAPTER VII.

ADULTERY.

Part I.—*Adultery by Wives: General.*

According to Native law, a man may claim^(A) a fine in cattle (or other live stock) as damages from anyone committing adultery with any of his wives.

In the first place, the woman must be his wife at the time the adultery is committed¹, although they may be living apart.²

Thus, where a woman had been forced into marriage, and had then run away with another native, and had lived with him as his wife, the Court held that her husband had no action against her abductor, as she had never been legally married at all.³

It will be seen from Chapter IV. that in East Griqualand a marriage may be dissolved by the woman leaving her husband with the intention of never returning, notwithstanding the fact that he may not have received back her dowry. In such cases, marriage is considered as dissolved from the day on which the wife leaves her husband. Thus, in East Griqualand, connec-

1. *Mnduze vs. Mdlimbi*, K., 1898; H., p. 27

2. *Mfishlo vs. Falani*, K., 1905.

3. *Modenela vs. Lurwasi*, K., 1908.

(A) It is custom amongst some tribes for the woman herself to be sent to the adulterer formally to demand damages (*Bungela vs. Sifile*, U., 1909; H., p. 243). Should the injured husband employ another native as his agent to procure the fine from the guilty party, such agent is, in the absence of any contract, entitled to remuneration for his trouble; but should his efforts be unsuccessful, nothing can be claimed by him. What remuneration he is to get will depend upon the success of his mission. The Court said that a beast was not an unreasonable fee, where the facts shewed that the messenger had obtained four beasts as a fine, after a previous agent had been unable to procure any. (*Mtambayahlaba vs. Sambata*, U., 1908; H., p. 187).

tion with such a woman would not amount to adultery.⁴ A third party's position becomes more secure, however, if he pays dowry and marries her.^{5(B)}

It is questionable whether connection with a deserting wife, unaccompanied by payment of dowry to her guardian, would not be considered adultery if her husband was still "keeping the case alive" by making repeated attempts to induce her to return. There has been no direct decision on this point; but the Court has held that children belong to the husband, if born of his wife by other men during that period.⁶

It would appear that if a wife has deserted, the onus is upon her husband to prove that she intends to return.⁷

In the Transkei and Tembuland, the law relative to dissolution of marriage differs from that in East Griqualand to some extent. In the former Territories, a marriage is not considered dissolved when a wife permanently deserts her husband, but the marriage holds good until the dowry paid for her is returned, or until there has been an order of Court obtained.⁸

The Appeal Court, at Butterworth, held that, even if a man married another's wife by Native forms in ignorance of her former marriage, he is liable for damages, though such damages would not be heavy. £7 10s. was actually awarded.⁹

Pondo custom also permits of damages being recovered under these circumstances, as men of that tribe are supposed to inquire fully into the status of their wives before marrying them. The usual damages are allowed.¹⁰

The Tembus, however, do not allow damages to be claimed in such cases.¹¹

The following cases are of interest:—

In an action for damages where it does not appear from the report that the second husband had no guilty knowledge, he

4. *Nodange vs. Gcwabe*, K., 1905. *Mbotshwa vs. Mahapa*, K., 1906. *Pato vs. Mshiywa*, K., 1906.*

5. *Xabaniswa vs. Dwayi*, K., 1906. *Pato vs. Mshiywa*, K., 1906.* *Mavana vs. Debendini*, K., 1907.

6. *Juleka vs. Sihlahla*, K., 1905; H., p. 88.

7. *Nodange vs. Gcwabe*, K., 1905.

8. See Chapter iv.

9. *Mhlolo vs. Maggadaza*, B.; W., p. 47.

10. *Mguzazwe vs. Betyeka*, U., 1908; H., p. 193.

11. *Mgenaka vs. Mditshwa* (Tembus), U., 1906; W., p. 30; H., p. 105. *Mnyulwa vs. Saliman* U., 1908; H., p. 185.

(B) See note on page 54.

was ordered to pay £30 to the Plaintiff.^{12(c)} He had married the woman according to Christian rites, and had had three children by her.

Again, £15 was awarded as damages where, knowing of her previous marriage by Native forms, Defendant had contracted a Native marriage with another man's wife. Plaintiff had stood by for some years without taking action, and the Court took this into consideration in its award.¹³

In the same way, the Court, holding that he had been guilty of contributory negligence, refused to award another Plaintiff more than two head of cattle, where he had allowed his wife to remain at her parent's kraal, and away from his protection, for two years, during which time she had married again by Native forms.¹⁴

A man accepting a second dowry for a married woman may be sued for its return, and for an order declaring the second marriage void, provided the second husband had no knowledge of the previous nuptials;¹⁵ but not otherwise.¹⁶ In the latter case, the stock received are the property of the woman's real husband, and can be claimed by him from her guardian,¹⁷ presumably as damages for adultery.

Part II.—*Adultery by Wives: Proof.*

It is not necessary, before damages can be claimed, for the guilty party to be actually caught by the woman's husband *in flagrante delicto*;¹⁸ neither is it essential that some articles of clothing, taken from the adulterer, according to the custom of natives, to furnish material proof ("ntlonze") of his having been caught in the act, be produced at the trial;¹⁹ but, in the absence of such evidence, the Court requires convincing proof

12. Mgotile *vs.* Jeli, B., ; W., p. 16.

13. Gqamse *vs.* Stemele, U., 1906; H., p. 113.

14. Mqwashu *vs.* Mesana, U., 1897; H., p. 15.

15. See Mnyulwa *vs.* Saliman, U., 1908; H., p. 185.

16. Mesana *vs.* Ntshanga, U., 1897; W., 32; H., p. 16.

17. *Ibid.*

18. Sohodi *vs.* Teku (Basutos), K., 1902; H., p. 56. Dlokova *vs.* Ngayitini, K., 1907; H., p. 165

19. Posela *vs.* Mtangayi, U., 1907; H., p. 163.

(c) This decision seems at variance with that in the case of Gqamse *vs.* Stemele (U., 1906; H., p. 113). (See p. 56.)

of the adultery, to guard against the possibility of cases being fraudulently invented.²⁰

It is customary amongst natives for the alleged adulterer to be kept informed of the condition of the woman whose pregnancy he has caused. When the child is born, or a miscarriage takes place, he is notified. Any omission to make these reports, even after the fine is paid, is looked upon as an element of proof in the accused man's favour;²¹ for failure to keep him informed precludes him from checking the events. For instance, it would deprive him of an opportunity of detecting a fraudulently alleged miscarriage.

A wife's unsupported testimony is not in itself sufficient evidence of adultery.²²

The fact that the alleged adulterer has been to the wife's kraal several times during the absence of her husband is evidence of guilt.²³

Part III.—*Adultery by Wives: Damages.*

A husband may claim damages for repeated adulteries;²⁴ and the fact that he has once sued the adulterer does not debar him from again doing so on a repetition of the offence. The scale of damages is not lowered for subsequent offences, as this would lead to immorality.²⁵

However, a husband cannot trade on the immorality of his wife, and there must be no collusion between the parties;²⁶ for, even if Native law were to allow it, the Court would not.²⁷ Likewise, nominal damages only will be awarded where a husband leaves his wife for long periods with her friends, in order to profit by her immorality.²⁸

An action lies for damages for adultery whether pregnancy follows or not.²⁹

20. Posela *vs.* Mtangayi, U., 1907; H., p. 163.

21. Notatsala *vs.* Zenani, U., 1908; H., p. 209.

22. Damoke *vs.* Nqikela, K., 1905.

23. Cala *vs.* Njamela, K., 1904.

24. Damoke *vs.* Nqikela, K., 1906. Ntshinguzi *vs.* Kateba, K., 1906.

25. Mondli *vs.* Buza, U., 1907; H., p. 160.

26. Piki *vs.* Madi, K., 1905; H., p. 95. Madola *vs.* Munka, J. 11; p. 181.

27. Dantile *vs.* Tirara, 9 J., p. 455 (1892).

28. Mondli *vs.* Buza, U., 1907; H., p. 160.

29. Singunduzi *vs.* Ntlukana, K., 1905.

When a child is born of an adulterous connection, it does not belong to its natural father, but to the husband of its mother. Payment of a fine by the adulterer does not entitle him to the child.³⁰

The usual fine awarded by the courts as damages for adultery is three head of horned cattle,^{31 (u)} of the value of £5 each³²; and where a magistrate had awarded more than that number for one offence, the Appeal Court reduced the fine.³³ In one case the Court said: "The value of cattle in cases of adultery has, by previous decisions of this Court, been fixed at from 2 to £5 each."^(E) ³⁴

One of the animals composing the fine is looked upon by the natives as a "cleansing beast,"³⁵ i.e., a beast paid by the wrong-doer to "cleanse him from his sin."

The fine is increased when there have been continuous adulteries. Thus, where a Defendant had twice caused the pregnancy of Plaintiff's wife during the latter's absence at work, five head of cattle were awarded as damages,³⁶ the Court remarking that the absence of the husband did not justify the immoral conduct.

Again, £30 was awarded as damages where three children were born of a woman in adultery, and she had lived with the Defendant for a number of years as his wife.³⁷

If there are aggravating circumstances surrounding the adultery,^(F) as, for example, the communicating of a venereal

30. *Sibuta vs. Mpenya*, K., 1903.

31. *Sohodi vs. Teku* (Basutos), K., 1902; H., p. 56. *Mtshiswa vs. Tshayisandla*, K., 1906. *Sisinga vs. Mbulali*, K., 1906. *Nambololo vs. Ozunqu*, K., 1905. *Bingela vs. Sifile*, U., 1909; H., p. 243. *Mondli vs. Buzi*, U., 1907; H., p. 160. *Makwenkwana vs. Thompson*, K., 1905.

32. *Ibid.*

33. *Mkutu vs. Sigaou*, K., 1906.*

34. *Piki vs. Madi*, K., 1905.

35. *Notyabaza vs. Gxumbisi*, K., 1898; H., p. 24.

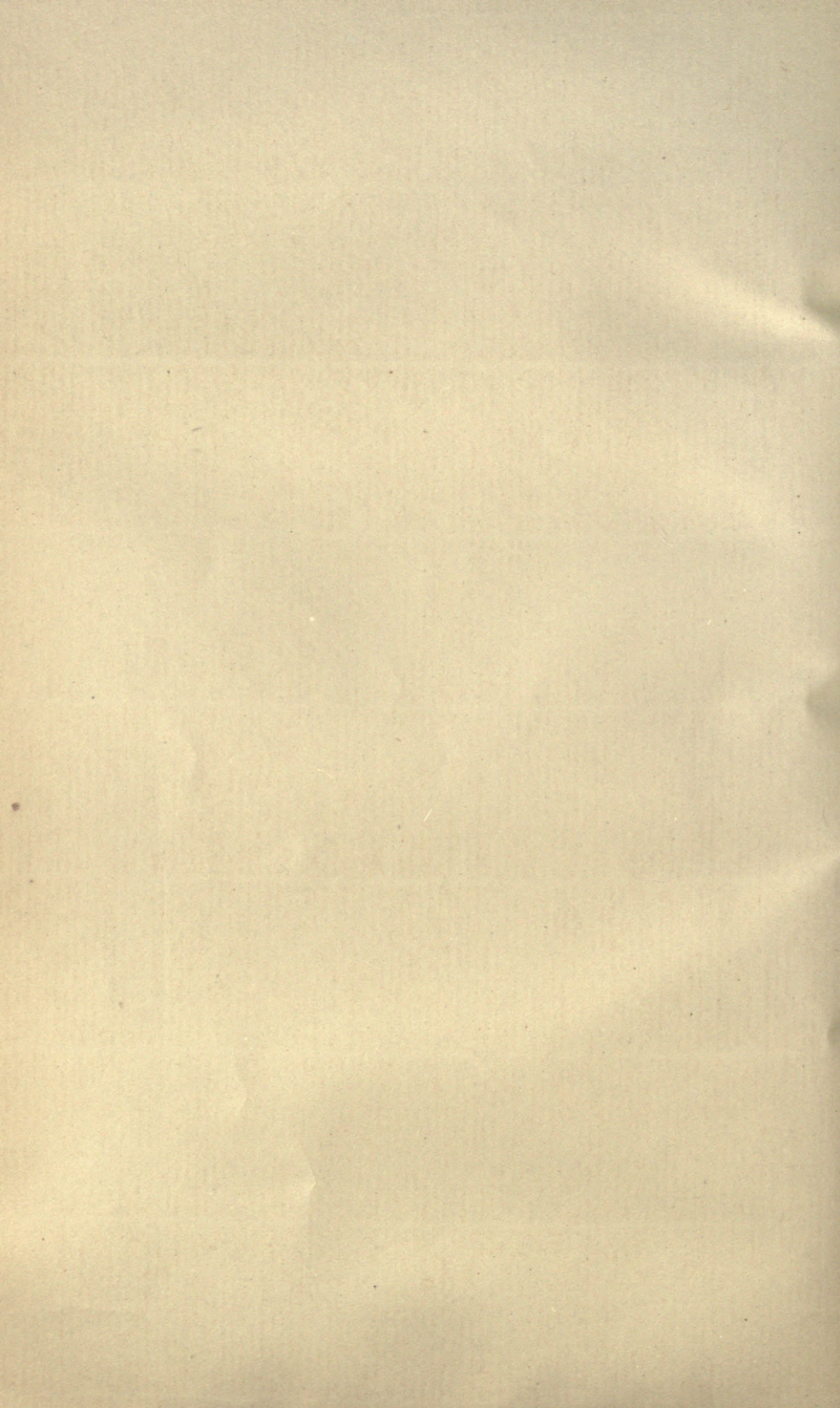
36. *Ludidi vs. Qokaba*, K., 1908.

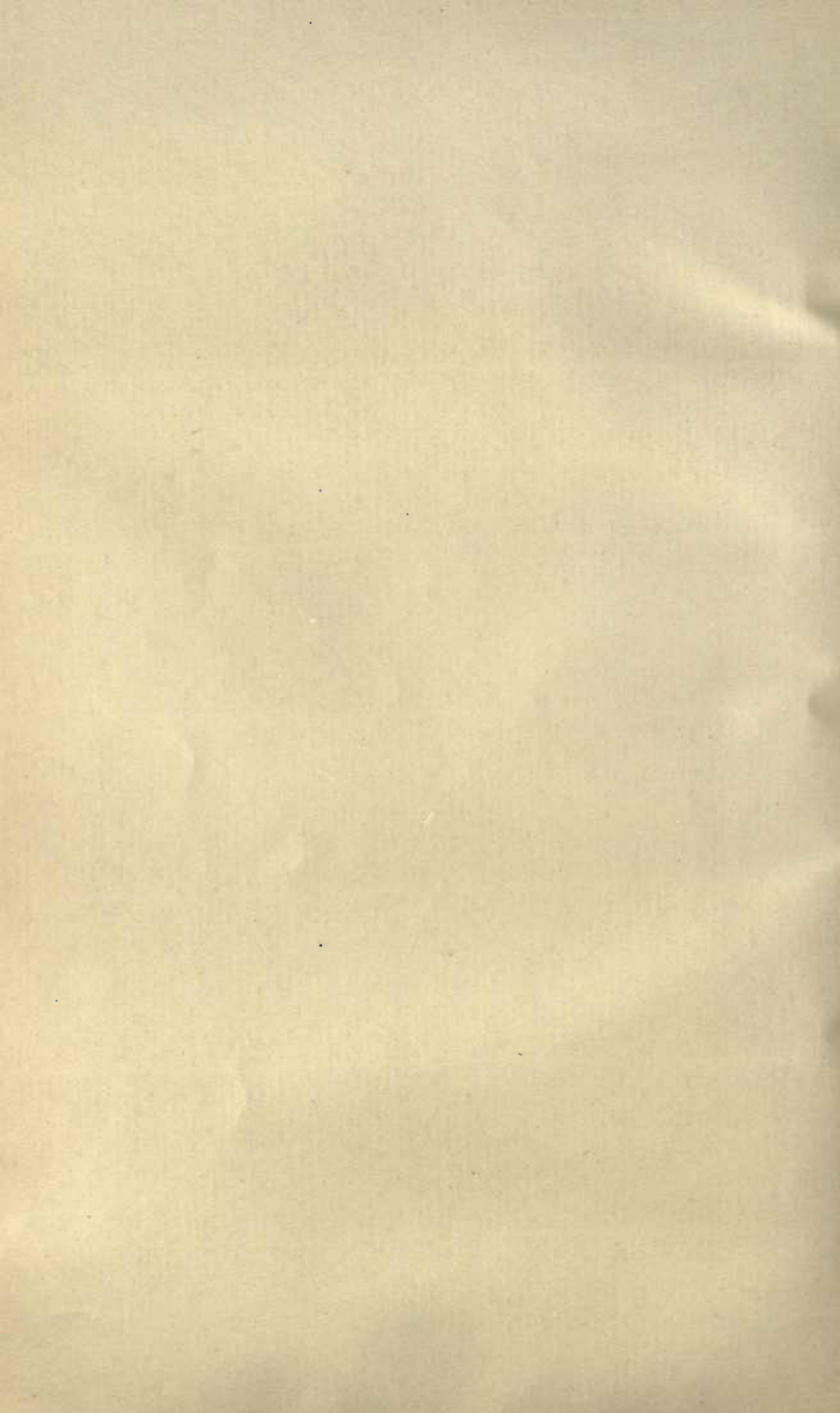
37. *Mgoloteli vs. Jeli*, B.; W., p. 16.

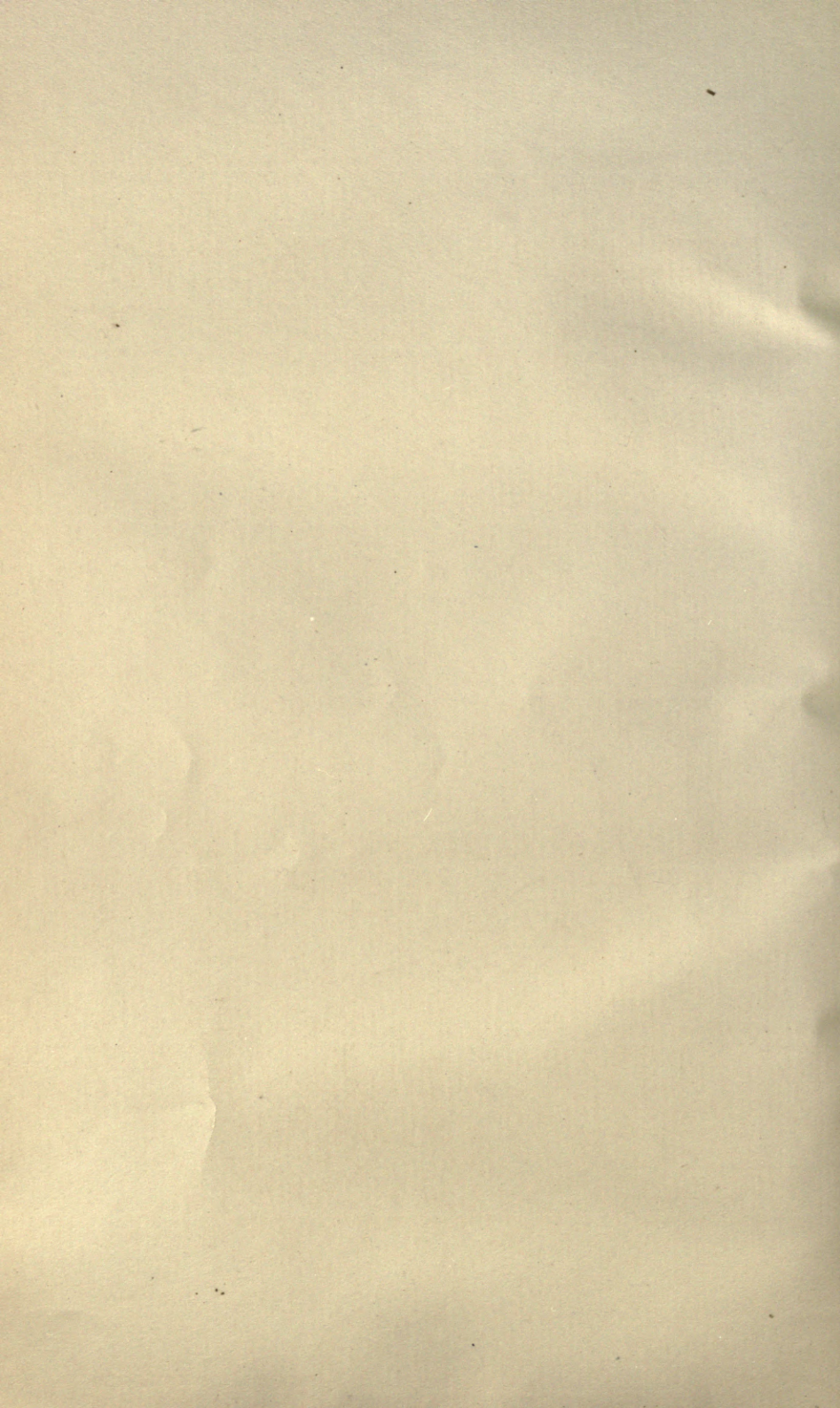
(D) Amongst the Bacas, this fine is fixed at five head of cattle. Amongst natives resident in the Umzimkulu District and natives within the jurisdiction of the Appeal Court at Umtata, the fine for adultery is raised to five head of cattle where pregnancy occurs. There is a movement on foot to make this fine general throughout the Territories.

(E) These words do not appear in Henkel's report (H., p. 95). The number of cattle awarded is not stated in Henkel's report.

(F) The fact that the woman has not weaned her last child when the adultery is committed aggravates the offence according to native ideas.







disease to the woman, larger fines are awarded.³⁸ Thus, ten head of cattle were awarded as damages where syphilis had been contracted.³⁹

Where a Pandomisi set up the defence that, according to his tribe's customs, he was only liable for one beast for committing adultery, the woman being his uncle's wife, the Court refused to lessen the fine merely because the act amounted to incest; and awarded four head of cattle, or £12.⁴⁰ The Defendant, in the course of his argument, contended that strict Native law was opposed to natives getting rich out of their relations' "misfortunes"; and that an injury done by one relative to another was redressed by the injuring native being fined one beast "to heal the injured party's sore," such beast going to benefit the neighbours of the parties concerned, and not to enrich the complainant.

Fines vary with the status of the parties; anything up to ten head of cattle, more or less, may be claimed by chiefs; but great care should be taken to secure satisfactory proof of status.⁴¹

A headman is not considered by the Court as being on an equality with the commonalty, although the natives themselves do not recognise any distinction.⁴² In the case quoted, the sum of £20 was awarded as damages for Defendant's adultery with a headman's wife.

Where parties are married according to Christian rites, a monetary claim may be made, instead of the usual one for kine.⁴³ The fact that the Plaintiff has been married in a Christian church does not entitle him to higher damages than those usually awarded to natives.⁴⁴

Part IV.—*Adultery by Wives: Miscellaneous.*

The fact that divorce is not sought does not invalidate a claim for damages for adultery, provided there has been no collusion between the guilty party and her husband, even though they may have been married under Colonial law.⁴⁵

38. *Magwaxaza vs. Nqanqane*, K., 1909; H., p. 273.

39. *Ibid.*

40. *Notyabaza vs. Gxumisa*, K., 1898; H., p. 24.

41. *Makopo vs. Tsikuane*, K., 1905.

42. *Qingqe vs. Mpikilile*, U., 1906; H., p. 130.

43. *Dingiswayo vs. Dingiswayo*, W., p. 6.

44. *Ibid.*

45. *Binqela vs. Sifile*, U., 1909; H., p. 243 *Mlotana vs. Rumdwana*, U., 1905; W., p. 40; H., p. 92.

A native not only has the right to claim damages against the man who actually commits adultery with his wife, but he may also claim them from her own guardian when the connection takes place at the latter's kraal. The guardian can escape liability by simply inducing his ward to divulge the name of her adulterer. When she does this, the husband's only recourse lies against the adulterer himself.⁴⁶

It is not unusual for a guardian, while his married daughters are visiting his kraal, to collect fines due for adulteries committed with them there.⁴⁷ The cattle received are passed on to their husbands.

Dissolution of marriage has the effect of estopping a native from proceeding with an action for damages for adultery, or, at any rate, with an action not commenced before a decree of divorce is granted.⁴⁸

Part V.—*Adultery—Widows: East Griqualand; Pondoland.*

In East Griqualand, in some instances, an action lies for damages for adultery with a widow. The Appeal Court, at Kokstad, said that there was a mistaken idea that a fine was never claimable, and held that each case had to be tried on its merits, and according to the customs of the tribe to which the parties belonged.⁴⁹

That the man who "ngenaes" a widow cannot be proceeded against is beyond dispute. It has been held that a "seed-raiser" is not liable for damages for intercourse with the widow (not "ngenaed") with whom he is cohabiting.⁵⁰

An action for damages lies against a third party who has connection with an "ngenaed" widow. This action must be brought by the deceased husband's heir;⁵¹ it cannot be taken by the man to whom the woman has been "ngenaed," unless no heir to her late husband exists.⁵² This, however, is not Pondo custom, according to expert evidence,⁵³ and, amongst natives of that tribe, the "ngenaing" man may sue.

46. Mlinganiso *vs.* Mngedane, K., 1906.*

47. See facts in Ndlanya *vs.* Mhashe, U., 1906; H., p. 112.

48. Ndlanya *vs.* Mhashe, U., 1906; H., p. 112.

49. Thakudi *vs.* Jacob, K., 1905.*

50. *Ibid.**

51. Matia *vs.* Moalosi, K., 1906.*

52. Thakudi *vs.* Jacob, K., 1905.* Matia *vs.* Moalosi, K., 1906.*

53. Nonkanyesi *vs.* Mosani, U., 1906; W., p. 45. Reported in Henkel as Manyosine *vs.* Nonkanyezi (p. 114).

It may be here mentioned that, amongst the natives of the Pondo tribe, no fine is claimed for cohabitation with a widow who remains at her late husband's kraal; but if she returns to her father, she is no longer considered her husband's widow, and a fine is payable for intercourse with her there.⁵⁴ In this latter case, the fine paid belongs to her father, and not to her husband's heir.⁵⁵ The children born at her father's kraal belong to their putative father, if he pays cattle for them. Should he not do so, then such children belong to the heir of their mother's late husband, provided he elects to pay cattle for them. Should neither of these two parties exercise his option, the children are the property of their mother's father, or of his heir.⁵⁶ The children born of a widow who elects to remain with her late husband's people belong to the deceased man's heir.⁵⁷

If an adulterer pays the fine imposed upon him for his intercourse with a widow, he is entitled to the child born.⁵⁸

It may be mentioned that, in all the cases quoted on this subject, pregnancy followed the adultery.

Neither the husband nor the widow's own people can trade on her immorality.⁵⁹

No action lies for adultery or intercourse with a widow who is not residing at her late husband's kraal (which term includes the kraal of her late husband's people),⁶⁰ or who is not allotted as wife to a relative of her late husband for the purpose of "seed-raising."⁶¹ Likewise, no damages are claimable in respect of a widow, who, after being "ngenaed," has deserted from her husband's people.⁶² All such widows are looked upon as "loose women-dikasis,"⁶³ who are considered as having no appreciable value from a matrimonial point of view. Their

54. Dleleni *vs.* Mkwai (Pondos) U., 1909; H., p. 240. Goxo *vs.* Njivi, U., 1908; H., p. 188.

55. *Ibid.*

56. Goxo *vs.* Njivi, U., 1908; H., p. 188.

57. Goxo *vs.* Njivi, U., 1908; H., p. 188. See also Tsibiyana *vs.* Ngceni, F., 1908; H., p. 204.

58. Bisa *vs.* Zibukwana, K., 1905.* Mabengo *vs.* Nququ, K., 1905.

59. Piki *vs.* Madi, K., 1905; H., p. 95.

60. Mazola *vs.* Nyangiwe, K., 1897; H., p. 21

61. Nkwane *vs.* Nqakamatye, K., 1903.*

62. Raqa *vs.* Qawe, K., 1895; H., p. 14

63. Nkwane *vs.* Nqakamatye, *supra*.*

children belong to the estates of their late husbands,⁶⁴ except where the widow has been disowned and driven away permanently by her husband's heir in such a way as to preclude him from ever reclaiming her dowry, as, for instance, when she is "thrown out" on a charge of witchcraft; for she would then be considered no longer a woman of her late husband's kraal.⁶⁵

The fine imposed for adultery with a widow varies with the status of the parties concerned. In one case⁶⁶ as many as eleven head of cattle were paid as damages for adultery with a Hlangweni chief's widow.

The usual fine is from one to four cattle,⁶⁷ substantial, not nominal, damages being awarded.⁶⁸

Part VI.—*Adultery—Widows: Transkei and Tembuland.*

In these Territories an action by a deceased husband's heir for damages against the man causing the pregnancy of a widow is unknown.^(c)⁶⁹

64. Nkwane *vs.* Nqakamatye, K., 1903.* Mazolo *vs.* Nyangiwe, K., 1897; H., p. 21. *Vide* expert evidence in *re* Tsweleni *vs.* Nyila (Pondos), F., 1909; H., p. 256.

65. Tsibiyana *vs.* Ngceni (Pondos), F., 1908; H., p. 204. See also Mapura *vs.* Aulia (Basutos), K., 1908.

66. Dobeni *vs.* Baka, K., 1903; H., p. 58.

67. Mazolo *vs.* Nyangiwe, K., 1897; H., p. 21.

68. *Ibid.*

69. Jama *vs.* Veldtman, B., 1906; W., p. 25; H., p. 107.

(c) As the Courts now hold that a widow is a major under Proclamation, there can be no doubt that a widow herself may now claim for any damages she may have sustained by reason of her having been seduced and made pregnant provided the Courts elect to try her case under Colonial law. Further, it will be seen from the case of Mlotana *vs.* Rumdwana (U., 1905; W., p. 40; H., p. 92) that actions for damages for adultery are looked upon as protective measures taken to secure women from inroads of dissolute men. If no action at all could be brought in respect of adultery with widows, their position would be worse than that of prostitutes in the Colony proper, who, at any rate, may claim for lying-in expenses, etc., from the man responsible.

Moreover, the Courts have now placed a widow outside the protection and guardianship of her late husband's people.

CHAPTER VIII.

SEDUCTION.

Part I.—*Fines.*

An action for damages, by way of a fine in live-stock, lies according to Native custom against the seducer of a native woman. The amount of the fine is fixed by agreement, and, in default of an agreement, by custom.^(A) If the parties submit the matter to their headman, and accept his award, their action constitutes an agreement. Both parties are bound by the award.¹ If the headman's decision is not accepted by either party, then neither is bound by it.²

The action is generally brought by the injured woman's guardian, and not by the woman herself.

Amongst some tribes, the fine for deflowering a virgin, where no pregnancy follows, is two head of cattle, one being called the "cleansing beast," and the other the "nqutu beast."³

Thus, where a native sued for the return of a dowry deposit which he had paid for his intended wife, whom he had seduced, the Court allowed her father to deduct two cattle from the stock ordered to be returned, as a fine for the defloration, which had apparently taken place prior to the engagement.⁴ An additional beast was also allowed the guardian as a fine for elopement.

1. *Ramba vs. Dwe*, U., 1907; H., p. 161.

2. *Ibid.*

3. *Ngwaleni vs. Lengezweni*, K., 1905.*

4. *Ngwaleni vs. Lengezweni*, K., 1905.* *Nontangana vs. Manyosi*, K., 1904.

(A) The amount of the customary fine remains the same, whether the parties concerned are what are known as "raw" Natives, or whether they are "dressed" natives. See *Mahlinga vs. Kabingwe* (Pondos), F., 1909.

The usual fine for a seduction, followed by pregnancy, is three head of cattle of the value of £5 each^(b)5 Where a Basuto endeavoured to prove that he was entitled to "half a dowry" as damages for the seduction of his daughter, the Court refused to uphold him, and awarded him the usual number of cattle.⁶

Amongst the Fingos, one beast is claimable as damages if a girl "goes wrong" at an "intonjane."⁷ If there are no aggravating circumstances surrounding a seduction, not followed by pregnancy, of a woman of that tribe, one head of stock only is the usual fine. Each case is tried on its merits.⁸ Thus, where a Fingo woman was as much to blame for her defloration as her seducer, and there had been repeated connections, only one beast was allowed.⁹ In aggravated cases two or three head of cattle form the fine.¹⁰ When pregnancy follows the seduction three head of cattle are awarded.^(c)

Amongst other tribes, when there are "exceptionally painful circumstances" surrounding the seduction,¹¹ as, for

5. *Mfayize vs. Mqukuse*, B., 1906; H., p. 127. *Mkutu vs. Mtengana*, F., 1908; H., p. 183. *Mphatsua vs. August*, K., 1905. *Mxotwa vs. Griffiths*, K., 1906.*

6. *Sapula vs. Mouli*, K., 1903.*

7. *Godogwana vs. Runeli*, B., 1902; W., p. 12; H., p. 54.

8. *Godogwana vs. Runeli*, B., 1902; W., p. 12; H., p. 54. *Ramba vs. Dwe* (tribe not stated), U., 1907; H., p. 161.

9. *Ibid.*

10. *Ibid.*

11. *Sapula vs. Mouli*, K., 1903.*

(B) Fines for seduction vary. Amongst the tribes resident in the Transkei and Tembuland the fine for defloration is one head of cattle, when pregnancy follows the fine is increased to three head. Amongst the Basutos and Hlubis the fine for defloration is one head of cattle; if elopement also takes place, an additional beast is claimed; should pregnancy follow, the full fine is usually three head of cattle, and, should the seducer wish to claim the child, he pays an additional beast. Amongst the natives resident in the District of Umzimkulu, and the Bacas, the fine for defloration is three head of cattle; should pregnancy follow, the fine is raised to five head. Payment of this latter fine entitles the seducer to the child.

Amongst the Pondos the fine for defloration is one head of cattle; should pregnancy follow, the price is usually increased to three head. See *Mahlinza vs. Kablingwe* (Pondos), F., 1909.

(c) It may here be mentioned that there is a movement on foot to fix the fine for ordinary defloration at one head of cattle, and the fine for seduction, followed by pregnancy, at three head, amongst all natives.

example, the communicating of a venereal disease to a woman, it is usual to allow more than three head of cattle.

If there has been continual intercourse, and pregnancy follows, the fine is raised. Thus, where a native had "free intercourse" with a woman, and pregnancy followed, five head of cattle (valued at £5 each) were awarded as damages.¹²

Again, where a Pondo, after abducting a girl, and paying a "bopo" beast, had again abducted her and retained her at his kraal for two years as his wife, he was ordered to pay five additional head of cattle for his action, the "bopo" beast not being taken into consideration.¹³

If the act of defloration occurs while there is a contract of marriage between the parties, or during the time the woman is abducted, and the marriage contract is broken off in such a way as to entitle the intended husband to recover the whole of the dowry deposit paid on account, only one beast, the "nqutu beast," is allowed to the woman's guardian for such dowry.¹⁴

Similarly, only one beast is claimable for the seduction and pregnancy of an intended bride, when her intended consort and seducer dies before marriage;¹⁵ but if the woman dies before marriage, after being made pregnant, the usual fine of three head of cattle is payable.^(D) ¹⁶

If a native is at fault in carrying out his agreement to marry a woman whom he has seduced while under contract to marry her, a larger fine is imposed upon him. Thus, where a woman's guardian sued her intended husband for dowry, tendering the woman; or, as an alternative, claimed a fine for her seduction and pregnancy, the Court ordered Defendant either to pay the dowry and marry the woman within three months, or to pay five head of cattle (valued at £10 each) as a fine for seduction.¹⁷

12. *Sixolo vs. Mbenjana*, K., 1908.

13. *Nomdenge vs. Xontani* (Pondos), U., 1908; H., p. 186.

14. *Manyela vs. Yakumina*, K., 1903.* *Dodo vs. Maqaiya*, U., 1898; H., p. 23

15. *Malusi vs. Dandi*, U., 1908; H., p. 169.

16. *Mfayize vs. Mqukuse*, B., 1906; H., p. 127.

17. *Kudede vs. Dioto*, K., 1905.

(D) This seems to be illogical; for in such a case no blame can be said to attach to the intended husband, and, where he is not in default, one head is the usual fine.

In another case, where, apparently, the intended husband was at fault in failing to marry a woman whose pregnancy by him had caused her to lose her billet as teacher, the latter was awarded five head of cattle (valued at £6 10s. each), as a fine for seduction.¹⁸ In this case the woman herself sued, assisted by her guardian. She also endeavoured to claim under Colonial law for lying-in expenses; but the Court refused to allow her to do so, and tried the case under Native custom.

Again, another seducer, who had caused the pregnancy of his intended wife, whom he had neglected to marry, was ordered to pay a fine of five head of cattle; the Court remarking that he might avoid doing so by marrying the woman.¹⁹

It will be noticed that the value of the cattle was raised in two of the above cases. Probably this was done to shew the Courts' disapproval of the Defendants' actions.

In another case, the native assessors were of opinion that an intended bridegroom, who had paid seven dowry cattle after abducting defendant's daughter and causing her pregnancy, was not entitled to any of the stock on his breaking off the engagement on account of his not being able to pay further cattle.^{(E)20}

The status of the parties may also affect the number of cattle allowed as a fine,²¹ anything up to ten head, more or less, being allowed to men of rank; and the woman's character is also a matter for consideration. Thus, where a woman (a mute) was not "of good character," only one head of stock was allowed as damages for intercourse with her.²²

Whether damages may be claimed for intercourse with, or seduction of, an unmarried woman^(F) who has already had a child, depends upon the custom of the tribe under which the case is tried. Amongst the Basutos, Hlubis, and tribes following customs similar to theirs, the fine for intercourse (not followed

18. *Mdlozini vs. Magaga*, K., 1906.

19. *Mbulawa vs. Mteto*, K., 1903.

20. *Gqezi vs. Nzaye*, K., 1909; H., p. 271.

21. *Mxotwa vs. Griffiths*, K., 1906.*

22. *Mdunyelwa vs. Mnyamana*, K., 1906.

(E) The seducer, being the defaulting party in carrying out the agreement to marry, would on that ground also not have been entitled to recover his cattle.

(F) The term "unmarried woman" in this chapter is not intended to embrace a widow.

by pregnancy) with such a woman would not be more than one head of stock; since the fine for deflowering a virgin is only two head, namely, the "nqutu beast" and "cleansing" beast, and only one "nqutu beast" can be claimed in respect of each woman.⁽⁶⁾

In referring a case back to the magistrate, the Appeal Court said that a fine was recoverable for a second connection (followed by pregnancy) with an unmarried woman who had not previously had a child.²³ In another case²⁴ it was held that a fine was claimable for causing the second conception of a woman, but that such fine would not be as large as that imposed on the first occasion. The Court said that if it allowed full fines for second offences it might lead to immorality. The Court, therefore, awarded a fine of five head of cattle as damages for two conceptions, and, in doing so, said that the cattle were a full fine, and that their payment would entitle the seducer to claim the two children born.

The right to claim damages for the second pregnancy of a woman is not acknowledged amongst all tribes. In one case,²⁵ the Court held that a man, who had twice made the Plaintiff's sister pregnant, was liable to be fined for the first offence only. Three head of cattle, or £15, were awarded.

Amongst the Tembus, no action whatever lies for damages for causing the pregnancy of a girl who has previously had a child, unless she is a chief's daughter.²⁶

The Pondos, on the other hand, maintain that a fine may be claimed for each pregnancy of an unmarried, or divorced, woman. Acting on expert evidence to this effect, the Court awarded a fine of three head of cattle for the pregnancy of a divorcee.²⁷

Part II.—*Rights in Children.*

A father of a seduced woman is guardian of her child, and can claim custody, even against its mother.²⁸

23. *Matele vs. Mtshitshi*, K., 1908.

24. *Ntwapantsi vs. Mazeka*, K., 1905.*

25. *Nkutu vs. Mtengana*, F., 1908; H., p. 183.

26. *Zidlele vs. Matshamba*, U., 1909; H., p. 263.

27. *Swelindawo vs. Myekeni*, U., 1909; H., p. 267.

28. *Bewbew vs. Dennis*, J., 21, p. 139. See also *Takayi vs. Mzambalala* (B., 1906; H., p. 121), where the woman's father was sued.

(6) Amongst the Hlangwenis, as many as seven head of cattle are claimable for causing the second pregnancy of an unmarried woman, for the act is considered to be an insult; the Courts, however, limit the fine to two or three head of cattle.

It is customary for a man marrying the girl he has seduced to pay her guardian an extra beast to entitle him to their illegitimate child;²⁹(H) but he cannot buy children born of his wife by other men previous to his marriage.³⁰

It is good Native custom that, if a seducer pays a full fine for his action, he is entitled to claim the illegitimate child,^(J)³¹ and he has the option of doing so.³² However, should a seduced woman marry before her child is born, it is considered, amongst Fingos, to belong to her husband, notwithstanding that its natural father has paid the customary fine;³³ but, amongst the Tembus, such a child, on payment of a fine by the seducer (but not otherwise), belongs to him, and not to the woman's husband.³⁴

Before a seducer can claim his child, he must pay "sondlo" (maintenance) cattle to its mother's guardian, and, until he does so, he may not claim the child.³⁵

Part III.—*Miscellaneous.*

A guardian cannot trade on the immorality of his ward; and there must be no collusion between the parties.³⁶

The Court requires further proof of the seduction than the unsupported testimony of the seduced woman herself.³⁷

The likeness of the child to the alleged seducer is not sufficient corroboration of the woman's statement to entitle a plaintiff

29. *Madangalazana vs. Marwanya*, K., 1903.

30. *Madangalazana vs. Marwanya*, K., 1903. *Barend Notwata vs. April*, U., 1905; W., p. 37; H., p. 98. *Tabankulu vs. Dyarashe* (Tembus), U., 1909; H., p. 260.

31. *Gqezi vs. Nzaye*, K., 1909; H., p. 271. *Takayi vs. Mzambalala*, B., 1906; H., p. 121.

32. *Mabengo vs. Nququ*, K., 1905. *Takayi vs. Mzambalala*, B., 1906; H., p. 121. *Ntwapantsi vs. Mazeka*, K., 1905.*

33. *Lupuzi vs. Sontondoshe*, B., 1909; H., p. 268. *Ndabeni vs. Ngqele* (Fingos), U., 1896; H., p. 10.

34. *Tabankulu vs. Dyarashe* (Tembus), U., 1909; H., p. 260.

35. *Mangqalaza vs. Ludidi*, B., 1904; W., p. 20; H., p. 82. *Takayi vs. Mzambalala*, B., 1906; H., p. 121. *Tshiki vs. Sodeli*, K., 1906.*

36. *Piki vs. Madi*, K., 1905; H., p. 95.

37. *Mafiso vs. M. Tamae*, K., 1905. *Doda vs. Lepheana*, K., 1907.

(H) This is not Tembu custom. See *Tabankulu vs. Dyarashe* (Tembus), U., 1909; H., p. 260.

(J) The illegitimate children born of a woman by her second husband (after dissolution of her first marriage) are, under certain circumstances, legitimatised by marriage. See *Moeiti vs. Nthako* (K., 1906).*

to succeed;³⁸ but, on the seduction being proved, the woman's evidence as to the paternity of her child is conclusive, and the more so as, amongst natives, it is considered a disgrace for a woman to deny it.³⁹

The chief under whom the parties reside has no right to the fines paid for the seduction of girls in his location.⁴⁰

Where a guardian has returned the dowry paid for his ward, and dissolved the marriage with her husband, he cannot afterwards put forward a claim for damages on the ground that his ward has been "spoiled" during marriage. He should make the necessary deductions before returning the stock.⁴¹

In the same way, where a man recovered the dowry of his wife, and the magistrate, in error of law, also awarded him the "nqutu" beast (the beast paid for deflowering a virgin), the Appeal Court held that, as the guardian of the woman did not appeal against the judgment, he could not afterwards institute fresh proceedings for a "nqutu" beast.⁴²

No action for seduction lies if the woman dies before the "charge" is brought against her seducer;⁴³ but her death does not otherwise invalidate a claim for the usual damages.⁴⁴

A woman's guardian may not bring an action for damages when the fact that there has been a seduction is only ascertained after her marriage; for in this case her husband, on finding his wife to be pregnant, has the right of action against her previous seducer.⁴⁵ If, however, such pregnancy was known of before dowry was paid and marriage concluded, the husband would have no right to sue;⁴⁶ and any action would be taken by the woman's guardian.⁴⁷ Should the seduction have taken place after dowry has been paid, but before the marriage has been consummated, the woman's future husband is entitled to the

38. *Mafiso vs. M. Tamae*, K., 1905.

39. *Maseti vs. Maciti*, U., 1898; H., p. 26.

40. *Zibi vs. Jokozele*, K., 1906.

41. *Pohloana vs. Ngqibelo*, K., 1906.*

42. *Matendi vs. Moroka*, K., 1905.

43. *Peri Mdinga vs. Mxozana*, B., 1906; W., p. 28; H., p. 132.

44. *Mfayize vs. Mqukuse*, B., 1906; H., p. 127.

45. *Mavolontiya vs. Tshetsha*, U., 1906; W., p. 36. *Tshetsha vs. Mavolontiya*, U., 1906; H., p. 111. *Mlungisi vs. Dlayedwa (Tembus)*, U., 1901; H., p. 44.

46. *Ibid.*

47. *Somdaka vs. Tshemese*, U., 1907; H., p. 146.

fine; and any cattle received by her guardian as damages are considered to have been taken by him as the agent of her future husband.⁴⁸

A Griqua is a native.^(κ)⁴⁹ Therefore a Griqua may, under Native law, sue a native of another tribe for a fine for seducing his daughter.⁵⁰ Such a case is decided according to the custom of the Defendant's tribe, under Sec. 23^(L) of Proc. 112 of 1879, which lays down that, in the event of a Plaintiff and a Defendant being of different tribes, the suit must be tried according to the law of the Defendant's tribe.

Amongst the Grikwas, there is no custom which permits a father to sue for damages for his daughter's seduction; and, in consequence, he has no action against another Griqua.⁵¹

Part IV.—“*Nyobo*,” “*Sedwangu*,” “*Nqutu*” and “*Nqobo*” *Beasts.*

Nyobo.—The word “nyobo” signifies a gift. It is a voluntary present before marriage from the bridegroom to the members of the bride's family.

Amongst the Hlangwenis, “nyobo” has almost always taken the form of a beast given to the women-folk of a wife's kraal, as a solace for her defloration before marriage. The Hlangwenis, and other tribes, “metsha” (*i.e.*, sleep with their intended con-

48. Lupuzi *vs.* Sontondoshe, B., 1909; H., p. 268.

49. Regina *vs.* Ellis, J. 7, p. 68. Maggies *vs.* Baatjes, K., 1903.

50. Maggies *vs.* Baatjes, *supra*.

51. Bezuidenhout *vs.* Barend, K., 1905; H., p. 87.

(κ) In Proc. 142 of 1910 the word “native” will not include Grikwas, Hottentots, and Bushmen, but will include all other aboriginal inhabitants of South Africa south of the equator, and any person who at any time has held an allotment of land under Proc. 227 of 1898 or Proc. 125 of 1903.

(L) The section reads as follows:—“In case of there being any conflict of law by reason of the parties being natives subject to different laws, the suit or proceeding shall be dealt with according to the laws applicable to the defendant.” In 1895, the Appeal Court at Kokstad, in the case of Patsana *vs.* Daniel (H., p. 1), stated that: “When a magistrate is called upon to decide what law shall apply in conflict, by reason of the parties being natives subject to different laws, he must be guided by the circumstances in each case.” The Court thereupon held that, where a native of the Tembu tribe had been brought up amongst Basutos and had lived in a Basuto location, he was bound by Basuto customs.

sorts without actually having connection); and it is also for this immoral privilege that "nyobo" is given.

Sometimes "nyobo" takes the form of an article of clothing, such as a blanket. It cannot be claimed in law,⁵² and is not considered as forming part of dowry. When once paid it cannot be reclaimed, since it is given for immoral consideration. If a beast is paid, it is generally slaughtered.

"Nyobo" must not be confused with a fine for seduction, which is not paid for immoral consideration.

"*Sedwangu*" *Beast* (Hlubi custom).—"Sedwangu" is the name for one of the animals paid for the seduction of a girl. It is given to the women of her kraal at the time the seducer returns the girl after elopement. It is insisted upon by the injured woman's people before marriage arrangements will be gone into. Should a marriage be arranged, the "sedwangu" beast takes the place of the "nqutu" beast, which is paid for the same purpose.

"*Nqutu*" *Beast* (Hlubi custom).—This beast, generally an ox, is paid by the bridegroom to the bride's womenfolk⁵³ before or after marriage is arranged, as a solace for the already accomplished, or contemplated, seduction of his consort;⁵⁴ or as an acknowledgment of his mother-in-law's care over the bride during her maidenhood.⁵⁵ The beast is generally fetched by the womenfolk of the bride's kraal upon her seduction being discovered.⁵⁶ It is paid in addition to, and does not form part of, the dowry stock, and cannot be reclaimed as such.⁵⁷ The beast is not legally claimable after marriage has taken place between the girl and her seducer, as all fines then merge into dowry. When paid, the beast is slaughtered and eaten.⁵⁸ Before marriage it may be recovered in law as part of the fine for defloration, but it may not be taken under an act of spoliation.⁵⁹ It is not cus-

52. Mlagwana *vs.* Silosini, K., 1907.*

53. Mgogo *vs.* Jan, F., 1909; H., p. 278.

54. Manyela *vs.* Yakumina, K., 1903.* Mehlomane *vs.* Nkwatsha, K., 1900; H., p. 33.

55. Magwanya *vs.* Mtambeka, K., 1901; H., p. 42.

56. Mehlomane *vs.* Nkwatsha, K., 1900; H., p. 33.

57. See Chapter iii.

58. Dlamalala *vs.* Sigaqana, K., 1903. Mehlomane *vs.* Nkwatsha, K., 1900; H., p. 33. Manyela *vs.* Yakumina, K., 1903.* Magwanya *vs.* Mtambeka, K., 1901; H., p. 42.

59. Mehlomane *vs.* Nkwatsha, K., 1900; H., p. 33.

tomary for an animal, when once paid as dowry, to be converted into a "nqutu" beast.⁶⁰ It is only when the bride is a virgin that her husband will pay a "nqutu" beast. When he marries a "dikazi," he will not do so.⁶¹

"Nqobo" Beast (Basuto custom).—This is the Basuto term for the beast known to the Hlubis as the "nqutu."⁶² It should be paid when the woman is taken to her intended husband's kraal to be handed to him as wife. If it is not paid, the wife's people worry her husband until they get it.

60. Manyela *vs.* Yakumina, K., 1903.*

61. Pakkies *vs.* Boloko, K., 1904.*

62. *Ibid.**

CHAPTER IX.

CLASSIFICATION OF ESTATES AND LAWS APPLICABLE.

Part I.—*Classification.*

Estates of deceased natives, married in the Territories, may be divided into four classes, viz. :—

1. Estates of natives married according to Christian rites before annexation.
2. Estates of natives married by Native forms before annexation.
3. Estates of natives married according to Colonial law after annexation.
4. Estates of natives married according to Native custom after annexation.

Part II.—*Intestate Estates.*¹

It will first be necessary to ascertain which of the Estates, classified above, are dealt with under Colonial law, and which are administered according to Native custom.

Intestate estates of natives, married under Christian rites before annexation, are dealt with according to Native custom.²

Thus, it was held³ that the estate of a native, who had married in Tembuland by Christian rites before 1879 (the year of annexation), and who had died in 1892, should be administered and distributed according to Native custom, and that an Executor appointed under Colonial law was not the proper person to administer the estate, and his appointment was cancelled.

1. Throughout this chapter the term "intestacy" is used in its ordinary legal sense.

2. Setlaboko *vs.* Lekhoase Setlaboko, K., 1909; H., p. 275.

3. Sekeleni *vs.* Sekeleni, J. 21, p. 118.

Again, where a woman ("great wife") had been returned to her guardian previous to her husband's marrying another wife by Christian rites before annexation, and had been reinstated after that marriage, it was held⁴ that the son born of the first wife after she had been reinstated was the chief heir of his deceased father.

Intestate estates of natives married by Native forms before annexation are dealt with according to Native custom, since the Proclamations annexing the Territories are not retro-active.⁵

Intestate estates of natives married in the Territories under Colonial law after annexation are dealt with according to Colonial law.⁶

Thus, it was held⁷ that the estate of a deceased native man, who had married according to Christian rites in Mount Fletcher in 1892 (after annexation), had been brought into community of property by such marriage; and that, on his death, the estate should be administered according to Colonial law.

Intestate estates of natives married by Native forms after annexation are administered and distributed according to their customs.

It will, therefore, be seen that intestate estates of all natives married in the Territories are dealt with under Native law, save only those of natives married according to Colonial law.

Intestate estates of unmarried children of all such natives are wound up under the same laws as the estates of their parents. Sec. 30 of Proc. 140, of 1885, gives the necessary authority for the estates of children born of marriages under Colonial law, being administered according to the laws of the Colony.^(A)

4. *Setlaboko vs. Lekhoase Setlaboko*, K., 1909; H., p. 275.

5. *Sekeleni vs. Sekeleni*, J. 21, p. 118.

6. Proc. 140 of 1885, Sec. 37. *November vs. Mapini*, E.D.C. 7, p. 3 (1892).

7. *Moruri vs. Moruri*, K., 1905.*

(A) *Addendum*.—Proc. 142 of 1910 will repeal Secs. 30 to 37 of Proc. 140 of 1885 in so far as these sections are repugnant to it. By Sec. 8 of Proc. 142 of 1910, immovable property, belonging to any native to whom the provisions of that Proclamation will apply, which is not situate outside the Territories or held under Proc. 227 of 1898 or validly bequeathed by will, and all movable property, not validly bequeathed by will, will, upon the death of such native, devolve and be administered according to Native law.

Sec. 12 of Proc. 142 of 1910 will provide that, in regard to the administration of such property as devolves according to Native law under that Proclamation, no Letters of Administration will be necessary

It must be understood that the above rules refer to intestate estates only, and to estates not affected by Proc. 227 of 1898, which stipulates for the administration and distribution of the estates of natives residing, or holding allotments, in the Districts in which it is in force.

Part III.—*Wills: Validity and Effect.*

Proclamations provide that any native may make a will.⁸

The effect of wills on the estates of natives married in the Territories under Colonial law is identical with that on estates in the Colony proper.⁹

Validly executed wills made after annexation by natives married under Native law are binding, even if in conflict with Native customs.^{(B)10}

The facts in one case¹¹ shewed that a native had taken unto himself several wives, and had distributed his cattle amongst their houses; that he had then made a will in proper form, appointing an Executor, and giving directions as to the distribution of his estate after his demise; that his "great wife's" eldest son had

8. Proc. 140 of 1885, Sec. 36, amended by Proc. 207 of 1899.

9. *Ibid.*

10. *Maqetseba vs. Mgwaqaza*, U., 1907; H., p. 163.

11. *Sigidi's Executor vs. Matambu*, J. 16, p. 297.

from the Master; that any suit between natives, relative to such property, will be tried under Native law, and that in any suit, in regard to such property, other than a suit between native and native, the heir according to Native custom of such property will be held to be the Executor in all respects as if appointed by the Master.

(B) *Addendum*.—Proc. 142 of 1910 will repeal Sec. 36, Proc. 140 of 1885 and Proc. 207 of 1889 in so far as they are repugnant to its provisions. By Sec. 8, Proc. 142 of 1910, any native, to whom the provisions of that Proclamation will apply, may devise by will according to Colonial law all his property, both movable and immovable, save and except movable property allotted under Native custom to any recognised wife or house of such native and immovable property held by him under the provisions of Proc. 227 of 1898; but no will will be considered invalid *in toto* merely because it contains an invalid bequest.

The estates of such natives, save that which is validly bequeathed by will, or which may consist of immovable property outside the Territories or of immovable property held under Proc. 227 of 1898, will be distributed according to Native custom. By Sec. 12 of Proc. 142 aforesaid, the administration of property legally devised by will, will be effected under Colonial law.

taken possession in the usual way upon his death, claiming to be heir in accordance with custom; and that an Executor had also been appointed under Colonial law. It was held that the Executor was entitled to possession of the estate, and to carry out the directions in the will; that the will was valid according to Colonial law; that the property allotted to the various "houses" still remained the property of the deceased, and should be dealt with according to the terms of the will; and that the will defeated the allotments.

Part IV.—*Proc. 227 of 1898.*^(c)

This Proclamation is in force in the several Districts in the Territories in which allotments of land have been granted to natives under quitrent title. Secs. 19, 20, 22 and 23 provide for the administration and distribution of the estates of natives who either held such titles, or were simply residing, in these Districts at the time of their demise.

Sec. 23 (as amended by Proc. 16 of 1905) describes how the immovable property and allotments of all such natives shall go on their death. It further provides that such immovable property cannot be devised by will.

Sec. 19 provides that all movable property left at the death of these natives shall be administered and distributed according to the usages and customs of the tribes or people to which they belonged. It further provides that if a deceased native has left a valid will, his property (save the immovables and allotments) shall be administered and distributed according to Colonial law.

(c) *Addendum.*—By Proc. 142 of 1910, the immovable property, held under Proc. 227 of 1898 by any native, will not be divisible by will and will devolve upon one male heir of the owner, to be determined by the "Table of Succession" in Schedule III. of that Proclamation, subject to the rights of the widows of the owner to use and occupy the property. (See Secs. 8, 9, 10). The other property of such owner will, upon his demise, devolve and be administered according to Native custom without Letters from the Master, save and except (1) property validly bequeathed by will, which will be administered according to Colonial law, and (2) immovable property situate outside the Territories. (See Secs. 8 and 12). Any suit between natives relating to the estate devolving according to Native custom will be dealt with by Resident Magistrates under Native law; and in any suit in regard to such an estate, other than a suit between native and native, the heir according to Native law will be held to be the Executor in all respects as if appointed by the Master; such cases may be tried in any Court having competent jurisdiction (see Secs. 6 and 12).

Sec. 20 provides that questions and disputes relative to intestate estates of these natives must be submitted to the magistrates, and not to the Master of the Supreme Court; and that no Letters of Administration are necessary in respect of them.¹²

The question then arises whether a native, married in community of property to his wife under Colonial law, could oust her out of her share in the joint estate by taking an allotment, or by residing in the Districts in which this Proclamation is in force.

The case of *Xaxa vs. Xaxa*,¹³ by analogy bears on this point. It was there held that community of property was not affected by Act 18 of 1864 in force in the Colony proper, whether marriage was contracted before or after its promulgation. This Act has to some extent the same effect on Native estates in the Colony as Proclamation.^(D)

Part V.—*Matrimonial Domicile.*

Estates of natives married in the Colony, but afterwards resident in the Territories, are dealt with under Colonial law.

Disputes arising in the Territories regarding estates of natives residing in the Colony proper must also be dealt with according to Colonial law.¹⁴

It may be noted that the estate of a native man holding a certificate under, or resident at the time of his death in a location proclaimed by, Act 18 of 1864, is administered according to the customs of the tribe to which he belonged. No letters of Administration are necessary in such cases.¹⁵

Estates of natives married in Basutoland, but residing in the Territories at the time of their demise, are governed by the laws in force in the domicile of the marriage. Thus, where evidence shewed that a Christian marriage had been entered into in Basutoland in 1856 by natives domiciled there, it was held that Basuto laws would govern the estate of the husband; and that he might

12. See also *Mnyateli vs. Mnyateli*, B., 1908; H., p. 178.

13. E.D.C. 7, p. 203 (1893).

14. *Poli vs. Mayekiso*, B., ; W., p. 28.

15. *Xaxa vs. Xaxa*, E.D.C. 7, p. 205 (1895). *Poli vs. Mayekiso*, B., W., p. 28.

(D) See also *Hartley vs. Ngwabeni* (S.C., 1910), in which the Court said that it was questionable whether Proc. 227 of 1898 would override Colonial law if the deceased native had married his wife under that law.

legally have made an allotment of his property, according to Native custom, to the "houses" of his wives.¹⁶

Part VI.—*Mixed Marriages.*

The question arises: what is the effect of a subsequent marriage under Colonial law on the property of a man who had previously married another wife according to Native custom, and had had children by her?^(E)

It has been held¹⁷ that if a husband, previous to his second marriage by Christian rites, apportions any property to his deceased first wife's "house" or children, that property is not brought into community, but belongs to the "house" or children to which it is given;¹⁸ that if no such allotment be made, all his property is brought into community, and, consequently, his whole estate is administered and distributed on his death according to Colonial law; and, further, that if a native, during the subsistence of his second marriage by Christian rites, elects to give any property to the children of his former wife by Native custom, he may do so.

In another action,¹⁹ the facts shewed that a native married a wife by Native forms, and apportioned certain stock to her; that she died leaving a son; and that the widower then contracted a marriage by Christian rites in 1894 (after annexation). It was held that he could not divert the property so apportioned from the "house" of his first wife to the "house" of his second wife. The magistrate's order restraining him from doing so was confirmed.

16. *Moruri vs. Moruri*, K., 1905.

17. *Moruri vs. Moruri*, K., 1905.*

18. It may be mentioned here that in the case of *Setlaboko vs. Setlaboko* (K., 1909; H., p. 275), it was decided that allotments, which had been made to the huts of native wives, who had been divorced in order that their husband might contract a subsequent marriage by Christian rites before annexation, held good.

19. *Jeke vs. Jantje*, J. 11, p. 125.

(E) *Addendum*.—By Sec. 4, Proc. 142 of 1910, no marriage under Colonial law or registered Native marriage, contracted during the subsistence of any marriage according to Native custom, will affect in any way the rights of property under that Proclamation of any wife of such Native marriage, or issue thereof; and the widow and issue of any such marriage under Colonial law, or of any such registered Native marriage, will have no greater rights in respect of the property of her deceased spouse than she, or they, would have, had the said marriage been a marriage according to Native custom.

In another case²⁰ it was held that an allotment of property by a native to the huts of his wives prior to, or at the time of, his subsequent Christian marriage was good in law, and indicated that he intended that their inmates should have no further claim on his estate.

It was further held that upon one of these huts becoming heirless, owing to the death of its male children, the husband, notwithstanding his Christian marriage, could exercise his rights under Native law, and appoint a son of one of his former wives as heir to it.

It will therefore be seen that the estates of natives married in the Territories under Colonial law are administered and distributed according to that law, notwithstanding that the husband may have contracted a previous marriage by Native forms; that any property apportioned to the children or wife of such first marriage before the celebration of the second does not form part of the estate brought into community by the later marriage, but forms an estate in itself, to be dealt with in accordance with Native law; that an allotment so made is irrevocable; and that any donations to the children of the first marriage during the subsistence of the second are valid.

Part VII.—*Executor and Heir (According to Custom):
Disputes.*

Should an Executor be appointed to an estate, which the heir under Native custom considers should be administered according to Native law, the course the latter should adopt is to sue such Executor to have his Letters of Administration set aside, and the estate placed under his (the native heir's) control.²¹

The Executor, while his appointment exists, has the right of possession of the estate to which he is appointed. Should the native heir wish to resist an action taken by an Executor to recover estate property in the hands of third parties, he should institute proceedings to have the Letters set aside.^(F)²² He cannot claim to be joined as co-Defendant.²³

20. *Poni vs. Memani*, B., 1906: H., p. 133.

21. *Setlaboko vs. Setlaboko*, K., 1909; H., p. 276. *Lekhoase Setlaboko vs. Estate Mveye*, K., 1909. *Sekeleni vs. Sekeleni*, J. 21, p. 118.

22. *Ibid.*

23. *Lekhoase Setlaboko vs. Est. Mveye*, K., 1909.

(F) The Magistrates of the Territories have no jurisdiction to grant orders in such cases. Application must be made to the Superior Courts of the Colony (*Mnyateli vs. Mnyateli*, B., 1908; H., p. 195).

Should a native heir consider that the properly appointed Executor is not treating him fairly in the Distribution Account of the estate, his remedy is to object to the Account in the usual way.

Should a dispute arise between the native heir and the surviving female spouse, relative to the ownership of the estate of her late husband (married to her by Christian rites), and the stock be forcibly seized by the heir, it is not necessary that Letters be taken out by the widow before she can claim restitution of the property.²⁴

Should an heir, claiming under Colonial law, wish to obtain an estate in the hands of the native heir, he should apply in the usual way to have Letters of Administration issued.

A daughter does not form part of the estate of natives married in the Territories under Colonial law, and her dowry, when paid after the death of her father, belongs, not to the joint estate, but to her father's heir under Native custom.²⁵ For this reason, the Court held that a surviving female spouse, who had collected her daughter's dowry, and, after handing it to the native heir of her husband, had taken out Letters of Administration, and endeavoured to get it back, had no claim, as Executrix, to such stock.^(c)²⁶

Again, the Appeal Court at Kokstad refused to compel a native heir to hand to the Executor of his parents' estate a dowry he (the heir) had received from a man who had married their daughter. The Court said that, should the girl so married desert her husband, he must look to the heir for return of dowry.²⁷

24. *Simoko vs. Simoko*, K., 1903.

25. *Lupuwana vs. Lupuwana*, B., 1904; W., p. 17; H., p. 72.

26. *Ibid.*

27. *Barker N.O. vs. Mohatla*, K., 1906.

(g) A Christian marriage in the Territories has the same effect upon the parties to the same and upon their issue as a marriage contracted under Colonial law (see Sec. 31, Proc. 110, 1879). Therefore, should a widow of a Christian marriage receive a dowry for her daughter, her husband's native heir, if not a party to the "lobolo" contract, would have no *locus standi* in an action against the widow for the stock.

CHAPTER X.

INTESTATE SUCCESSION UNDER NATIVE LAW.

Part I.—*General.*

On a native dying intestate, the eldest son of each of his wives inherits the property assigned and belonging to his mother's "house."¹ Thus, the eldest son of the "great house" inherits the property of that "house"; and the eldest son of the "right-hand house" inherits the property of that "house," and so on.²

If a Native neglects during his lifetime to declare in a formal and public manner what portion of his property he allots to his several establishments, his Estate is treated under Native law as intestate. In this case, the eldest son of the "great house" takes possession, as heir-at-law, of the whole of it;³ but he is thereupon bound to take charge of, and provide for, all his father's establishments, which are, however, of little burden to him, as the principal care of getting a living devolves upon the women themselves.⁴

The eldest son of the "great house" inherits all property of his father not specially assigned to any "house";⁵ but he has no control over the property of the other "houses" of his father in which there are heirs.⁶

The eldest son of each "house" is entitled to all dowries paid in respect of the marriages of his own mother's daughters,⁷ who

1. Walter E. M. Standford's expert evidence in *Sekeleni vs. Sekeleni*, J. 21, p. 118.

2. *Ibid.* Maclean's Compendium, 74.

3. *Ibid.*

4. *Ibid.*

5. N'Tengu *vs.* Ntshinga, K., 1906. Ntili *vs.* Mncisana, K., 1903; H., p. 68. Expert evidence in *re* *Sekeleni vs. Sekeleni*, *supra*.

6. Expert evidence in *re* *Sekeleni vs. Sekeleni*, *supra*.

7. *Ibid.* Malakabi *vs.* Malakabi, K., 1908.

are looked upon by natives as forming part of his inheritance. He may claim their custody even against their mother.⁸ However, if the girls have been specially assigned or allotted by their father, they and their dowries do not belong to the heir of their mother's "house," but are the property of the son to whom they are apportioned.⁹

Should a native have married one wife only, her eldest son inherits all his estate.¹⁰

In the event of there being no heir born in, or placed in, a particular "house," the eldest son of the "great house" inherits such heirless "house," and all its property,¹¹ unless an allotment of it has been made.

However, this rule is subject to the following exceptions: (a) The heir of the "'right-hand' house," or of the "'kohlo' house," inherits the property of its heirless "'qadi' house," or "'isetembu' house"¹² respectively. (b) In the absence of an heir to a major "house" the eldest son of its "qadi" inherits the property therein.¹³ Should no son be born in the "great house," the son of its "qadi" inherits the property of the "great house" in preference to the son of the "'right-hand' house,"¹⁴ who would otherwise succeed. Amongst the Pondos, however, the eldest son of the "'kohlo' house" inherits the property of an heirless "great house" in preference to the eldest son of the "isetembu" to the latter "house" unless the "isetembu" wife has been actually placed in the "great house" to bear children.¹⁵

Part II.—*Table of Intestate Succession.*

The property (*i.e.*, the inheritance of the eldest son of the principal ("house")) left at the death of a native devolves upon, and is claimable according to the rule of primogeniture by, one male person, who is called his principal heir. This heir is:

8. MacLean's Compendium, p. 74.

9. *Ibid.*, p. 75. Nyakata *vs.* Dubula, K., 1903.

10. Expert evidence in *re* Sekeleni *vs.* Sekeleni, J., 21, p. 118. Daniso *vs.* Mzingeli, F., 1902; H., p. 67.

11. Sidibulekana *vs.* Fuba (Tembus), U., 1901; W., p. 12; H., p. 49.

12. Tsweleni *vs.* Nyila (Pondos), F., 1909; H., p. 256.

13. Noseyi *vs.* Gobozana, B., 1908; H., p. 214.

14. *Ibid.*

15. Tsweleni *vs.* Nyila (Pondos), F., 1909; H., p. 256.

(a) The eldest son of the principal "house" or his eldest son's eldest male descendant.^(A) ¹⁶

(b) If the eldest son have previously died without leaving any male descendant, the next son or his descendant; and so on, through the sons respectively, and through the several "houses" in their order.

(c) If no son or male descendant of any son be living, then the father.

(d) If no father, then the eldest brother of such deceased person ¹⁷ of the same "house," or his male descendant;¹⁸ and so on, through the brothers of that "house" and their male descendants respectively.

(e) If no brother, or male descendant of any brother, of the same "house" be living, the eldest brother of the allied "house" of higher rank, or next rank, as the case may be, or his male descendant; and so on, through the brothers of such allied "house" and their male descendants respectively.^(B)

(f) If no brother, or male descendant of any brother, of such allied "house" as aforesaid be living, the eldest brother, or his male descendant, of the "'left-hand' house" ("indhlu yasekohlo"), where such "house" is recognised, in case such deceased person be of the principal "house" ("indhlu enkulu"); or, in case he be not of the principal "house," then the eldest brother or his male descendant of the house of higher rank, or next rank, as the case may be, and so on through the brothers or their male descendants respectively of the "'left-hand' house," or of the "house" of higher rank, as the case may be.

(g) If no brother or male descendants of any brother of any house be living, then the eldest brother of the father of such deceased person, or his male descendant; and so on, through the brothers of his father and their male descendants, respectively.

16. *Vide* facts in *Ntengu q.q. vs. Ntshinga*, K., 1906

17. *Vide* facts in *Cheka vs. Cheka*, K., 1905.

18. *Vide* expert evidence in *re Nonkanyesa vs. Mosani*, U., 1906; W., p. 45; H., p. 114.

(A) That this is so, even if the eldest son has predeceased his father, but left an heir, is seen from the case of *Lehloeka vs. Ranyenyele*, K., 1907.

(B) This would not apply to Pondos in all cases. See *Tsweleni vs. Nyila (Pondos)*, F., 1909; H., p. 256.

(h) Failing such brothers or their male descendants, then the grandfather or his male descendant.

"Male descendant" means a male descendant through males only.¹⁹

A male can, under no circumstances, inherit through a female line.²⁰

In the event of there being no male heir, the estate belongs to Government, which would support the deceased's widow and family to the extent of the property inherited.²¹

Part III.—*Heir to Chieftainship.*

The eldest son of a chief's "great wife" inherits the chieftainship of the tribe on the death of his father.²²

The question then arises as to who is the "great wife" of a chief.

In the tribe of the Western Pondos, the "great wife" of their chief is always his first wife, and her eldest son inherits the chieftainship.²³

This is not the custom followed by the leading chiefs of Tembuland and Gcalekaland,²⁴ and of other polygamous tribes of South Africa.²⁵ In these tribes, a chief is allowed to select a "great wife" from among his numerous spouses. This selection is done with the sanction of the tribe, which contributes to the payment of her dowry.²⁶

19. This table is taken from Sec. 23 of Proc. 272 of 1898. It is drawn up to provide for the intestate succession, under Native law, of immovable property belonging to the natives affected by that Proclamation. The rules of intestate succession set forth in MacLean's Compendium, pages 73, 74 and 75, are identical with the above only less detailed. Save for the omission of the words "or next rank" in par. f, the table of intestate succession of immovable property in the Territories under Proc. 142 of 1910 will be identical to the above.

In the case of *Lugqola vs. Mpombane*, K., 1907, it was held that a native could inherit the estate of his adopted son in the absence of descendants.

20. *Vide* Chapter xiii.

21. *Vide* Chapter xiii.

22. MacLean's Compendium p. 75.

23. *Sigidi vs. Lindinxwa* (Pondos), U., 1902; W., p. 43; H., p. 55. *Zulualeteti vs. Vikilahle* (Pondos), U., 1904; W., p. 44; H., p. 77.

24. *Sigidi vs. Lindinxwa* (Pondos), U., 1902; W., p. 43; H., p. 55.

25. *Zulualeteti vs. Vikilahle*, U., 1904; W., p. 44; H., p. 77.

26. *Ibid.*

This custom was followed by Chief Ngonyama of the Amanqanda tribe of Western Pondoland. He did not follow the rule of the chiefs there, but, with his tribe's sanction, and without opposition, appointed his second wife as his "great wife." The reason why this chief did not follow the usual custom of the chiefs of Western Pondoland is attributed to the fact that at one time he and his people migrated into Tembuland, and adopted Tembu custom to some extent. The Court upheld the appointment made by him, and, on his death, declared the eldest son of his second wife to be chief of the tribe.²⁷

The paramount chief of Pondoland allocates his wives after the style of the Tembus and other tribes.²⁸

The reason why the Western Pondos do not follow the usual custom is, in some measure, due to the fact that the founder of that tribe (Chief Ndamase) was not himself the eldest son of his father's "great wife."²⁹

Part IV.—"Xesibe" Custom.

Among the natives of the Xesibe tribe, which resides in the Mount Ayliff District, there is a custom in vogue similar to that of "uku-gena." As pointed out elsewhere in this work, the custom of "uku-gena" permits a relative of a deceased native to "raise seed" to the latter by taking his widow to wife. The issue are generally looked upon as legitimate children of the deceased's kraal.

The Xesibes go a step further, and permit the guardian of the deceased man's kraal (generally his brother or son) to marry a new wife in order to "raise seed" to that kraal. The dowry paid for this woman is wholly, or to a great extent, paid out of the deceased's estate. The children born are considered as belonging, not to the family of their father, but to the kraal of the deceased; and they inherit, or are inherited, accordingly.

Thus, in one case³⁰ the facts shewed that, after the death of a native, the son of the first wife married a woman to "raise seed" to the "house" of the third wife,

27. Zulualeteti vs. Vikilahle, U., 1904; W., p. 44; H., p. 77.

28. *Ibid.*

29. *Ibid.*

30. Ngqongwa vs. Sikemane, K., 1909; H., p. 252.

who had a son, Mggongwa. The dowry of this newly-married woman was paid partly from the property of the third house, and partly by the son marrying her. This woman had one daughter, Nozinzuki, and thereafter deserted to her parents, who dissolved her marriage, and returned her dowry. The son of the first wife then replaced the divorced wife by marrying another woman in the same way and for the same purpose. Her dowry was paid from the returned stock. She had a son called Mabaxa. The question then arose as to who was entitled to the dowry of Nozinzuki. It was held that it belonged to Mabaxa; and, further, that Mabaxa was the younger step-brother of Mggongwa.

In another case,³¹ it appeared that one Umbi was brother to one Qwayede. Umbi died, leaving property. Qwayede then married one Mamrwebi as his third wife, but, in doing so, intended her to be a "seed-bearer" to his deceased brother, and paid her dowry out of the latter's estate. A son, Mncisana, was born of this marriage. Thereafter Qwayede married a fourth wife, Madlabomi, and placed her at Umbi's kraal as a support to Mamrwebi's hut. Madlabomi had one daughter, but no son. Qwayede died, and the question then arose to which family this daughter belonged. It was held that Qwayede was within his rights in placing Madlabomi as a support to Mamrwebi's hut, and that the girl in question belonged to Mncisana, and not to the "great heir" of Qwayede.

31. Ntili *vs.* Mncisana, K., 1903; H., p. 68.

CHAPTER XI.

DISTRIBUTION OF ESTATES OF NATIVES DURING THEIR OWN
LIFETIME.Part I.—*Allotments to Houses.*

It has been explained in Chapter I that a native may legally marry more than one wife at a time; and in Chapter VI, their various ranks and status are described.

It is usual for a husband during his life to apportion cattle to the "houses" of his three major wives (the "great wife," "right-hand wife," and "left-hand wife") for the use of their occupants, but he seldom goes beyond this. Hence, the minor "houses" are generally dependent on the major establishments to which they are attached.¹

The dowries of the "qadi" or "isitembu" wives are paid out of the property of the major "houses," and the "qadi" or "isitembu" is attached to the "house" from which her dowry is taken. On the eldest daughter of a "qadi" or "isitembu" house marrying, her dowry is handed to its allied major "house" in return for the cattle paid for her mother.² One beast, at least, from such daughter's dowry is given to her mother's hut³ as compensation for bringing her up. According to Pondo experts, such a beast would be a gift, but, nevertheless, the Court, in the case quoted, awarded it.

The children born of these various wives belong to the establishments in which they are born. When the children are females, their dowries, when paid, are considered the property

1. MacLean's Compendium, p. 74.

2. See facts in *Maqakananya vs. Kobesi* (Pondos), U., 1906; H., p. 128. *Tsweleni vs. Nyila* (Pondos), F., 1909; H., p. 256. *Manyosine vs. Nonkanyezi*, U., 1906; H., p. 114.

3. *Tsweleni vs. Nyila* (Pondos), F., 1909; H., p. 256

of the "house" to which they belong, except when apportioned as explained hereafter.

In a corresponding manner, the dowries paid for the wives of the sons are taken from the property of the "house" to which they belong.

The property of each of these establishments is vested in the head of the kraal (*i.e.*, the husband of the wives of such establishments), subject to certain rights claimable by his wives and their children.⁴

It will easily be seen that one "house" may, for various reasons (such as being blessed with many daughters), become wealthy, and another may become abnormally poor.

The husband, or head of the kraal, may, therefore, fairly transfer the property of one "house" to another in need of support, or take it away in the general interests of his family as a whole.⁵ But he cannot use this power unjustly, and a wife may prevent her husband from unfairly diverting the property of her "house" to another "house."⁶ In the same way, he cannot dispossess the wife of any hut of the property allotted or belonging to it, without first consulting the inmates, and shewing good cause.⁷ Should he do so, he may be sued to restore it.⁸ Likewise, he cannot, without adducing sufficient reason, claim possession of any property he may have handed to a wife before she left to reside at the kraal of her eldest son.⁹ These preventive actions may also be taken by the heir of any "house" which is being unfairly treated.¹⁰

Nor can a husband, during his life-time, but after the death of one wife, give over the property of her "house" to another wife whom he may thereafter have married. If he attempts to do this, the heir of the deceased wife's "house" may sue in the Magistrate's Court for an order restraining him.¹¹

But the rights of the different "houses" to the property ap-

4. *Mfenqa vs. Tshali*, K., 1900; H., p. 31.

5. *Ibid.*

6. *Noseki vs. Fubesi*, B., 1900; H., p. 36. *Vide* expert evidence in *Sekeleni vs. Sekeleni*, J. 21, 118.

7. *Mfenqa vs. Tshali*, K., 1900; H., p. 31.

8. *Tibi vs. Tibi*, K., 1909; H., p. 251.

9. *Trobisa vs. Mbi*, B., 1897; H., p. 18.

10. *Vide* expert evidence, *Sekeleni vs. Sekeleni*, J. 21, p. 118. *Mfenqa vs. Tshali*, K., 1900; H., p. 31.

11. *Jeke vs. Jantje*, J. 11; p. 125.

portioned and belonging to them practically end there, for the father during his life-time is owner of all the property in his estate, and may dispose of it to third parties.¹² Neither wives nor sons have any ownership, during the life-time of the respective husband and father, in the property allotted to the huts to which they belong.¹³

The son and heir of an establishment cannot claim the custody of his late mother's "house" and of her children during the life-time of his father; nor can he prevent his father from removing with the stock of that "house" from one place to another; ¹⁴ nor should he, or his mother, when still alive, dispose of such property without first consulting his father and obtaining permission to do so.¹⁵

However, if a father is wasting his estate, the Court will step in and stop him, on application (by way of an action) being made by the heir or inmate of any "house" interested.¹⁶

It will, therefore, be seen that although a native may be prevented by his wives or children from unfairly transferring property from one "house" to another, or from taking it from a "house" without good cause being first shewn, such wives or children cannot lay any further claim to the property, more especially when the rights of third parties or of creditors are concerned. They can, however, prevent its being squandered.

When one "house" has daughters and another "house" has none, the father may transfer a daughter from the one "house" to the other.^(A) According to Fingo and Gcaleka custom, a father may transfer a daughter of a junior "house" to the "great house," and from the "great house" to the "right-hand house"; although, in the case of Fingos, it appears that

12. *Lehloeka vs. Ranyenyela*, K., 1907. *Sigidi vs. Matambu*, J. 16, p. 497.

13. *Ngejana vs. Qwani*, K., 1905*; *Mfenga vs. Tshali*, K., 1900; H., p. 31.

Expert evidence in *Sekeleni vs. Sekeleni (supra)*. *Mnyamana vs. Potwana*, K., 1906.*

14. *Tanagan vs. Stuurman*, K., 1902.

15. *Mfenga vs. Tshali*, K., 1900; H., p. 31.

16. *Tanagan vs. Stuurman*, K., 1900; H., p. 31.

(A) By this is meant that the daughter is allotted to the "house" itself, and not to the wife personally; for, amongst natives, a child, or her dowry, is never given to a native woman (*Gqumayo vs. Ziyokwana*, U., 1909; H., p. 231).

this latter transfer is only effected after consultation with the leading members of the family. The dowry of the transferred girl belongs to the "house" to which she is allotted.¹⁷

Part II.—*Allotments to Individuals.*

A father sometimes allots the dowry of one of his daughters to a specific son, in order that such son may have the means necessary to "buy a wife."¹⁸ The dowry of such daughter is handed over to the son by his father, who usually first makes deductions for wedding and "intonjani" expenses. Should he not make these deductions before parting with the stock, he cannot afterwards do so.¹⁹ Under certain circumstances, the son may be compelled to return the property given him, as, for instance, when the marriage of the daughter is broken off, and the dowry received has therefore to be returned.²⁰ According to Pondo custom, the father of a girl whose dowry has been allotted by him to a son may appropriate two cattle from her dowry, one of which is for her maintenance, and the other for his trouble in arranging her marriage. Under ordinary circumstances he cannot appropriate these cattle during the absence of the son to whom the dowry is given. But occasions may arise, as, for instance, where the donee has stayed away for many years, which would justify the appropriation taking place in his absence. Should the dowry cattle increase before appropriation, the father and son would share in proportion to the number of original stock to which each is entitled.²¹

The dowry to be paid for a son's wife may be taken by his father from the property of a "house" to which such son does not belong, on the condition that a similar amount of stock shall thereafter be returned to that "house." If this be done, a like quantity of stock may, after the death of the father, be claimed back by the heir of that "house" from the man whose dowry had thus been paid, should the liability not have already been liquidated.²² The transaction amounts to a loan, and is not an allotment.

17. Mtshotshana *vs.* Mtshotshana, B., 1905; W., p. 22; H., p. 100.

18. Tibi *vs.* Tibi, K., 1909; H., p. 251.

19. *Ibid.*

20. *Ibid.*

21. Ntsangwana *vs.* Sityebi (Pondos), U., 1909; H., p. 266.

22. Mazekweni *vs.* Tshiyo, K., 1907.

It is customary for a father, when he is well off and can afford to do so, to set up his sons with stock with which to support themselves when they marry or reach manhood.²³ The question of property in this stock would be decided upon the conditions under which it had been given.²⁴ In the case of stock given to the eldest son of a "house" under such circumstances, it may be broadly stated that generally no condition is imposed, for the father would merely be handing over property which would devolve upon such eldest son at his (the giver's) death.²⁵

When allotting daughters to different members of his family, it is customary for the father to consult all interested persons. This, however, is not absolutely necessary, and a father need not consult even the heir to whom the allotted girl would otherwise belong.²⁶

Part III.—*Heirless Houses.*

In the event of there being no son born in one of his "houses," the husband either assigns the girls and property of such heirless "house" to a son, or sons, of another of his establishments, or he places in it a son from some other "house" to be heir.²⁷ In the former case the sons inherit such property as is allotted to them; in the latter case the son is considered to be a son of the "house" in which he is placed, and, as such, inherits the estate²⁸ belonging to it.

Sometimes another woman is placed in an heirless hut to raise a son to it.²⁹ When this procedure is adopted, the son born of the "seed-bearer" inherits the property of the hut in which she is placed; but, should a son thereafter be born of the true wife of the hut, he is heir, and the son of the "seed-bearer" is withdrawn.³⁰

Amongst the Basuto tribes, a man who has no male child

23. Expert evidence in *Sekeleni vs. Sekeleni*, J. 21, p. 118.

24. *Ibid.*

25. *Ibid.*

26. *Nyakata vs. Dabula*, K., 1903

27. *Sibozo vs. Notshokovu*, B., 1908; H., p. 198. *Poni vs. Memani*, B., 1907; H., p. 133. *Fuba vs. Sidibulekana*, B., 1902; W., p. 13; H., p. 52 (*Fingos*).

28. *Ibid.*

29. *Nosenti vs. Sotewu*, B., 1909; W., p. 27; H., p. 117.

30. *Molefe vs. Ntebele* (*Basutos*) K., 1907; H., p. 167.

sometimes marries another wife, and places a blood relation of his in her hut to beget a male child to him. A son born of such an arrangement inherits, provided no male child is ever begotten by the husband of any of his other wives.³¹

Another course, which is not unusually taken by a native who finds himself without a male child, is for him to adopt an heir. This he may lawfully do by calling his family and relatives to a properly convened meeting, and announcing his decision. The chief of his tribe is either present or notified of the step taken.³² In the case quoted, a relative was appointed.

The heir so adopted inherits in preference to the natural heirs (ascendants or eldest brother) of the deceased.³³

Should a wife die, or her marriage be dissolved³⁴ before leaving male issue, her husband may marry another woman "to take her place." The new wife is given the rank of the late wife, and her children are considered (for hereditary purposes) full sisters and brothers of the children of the earlier wife.³⁵ Her son is heir to the family and property of both women.³⁶

The following cases bear on this subject:

In one case ³⁷ the facts showed that, on there being no son born to his "'right-hand' house," the husband placed a younger son of his "great house," called Wellem, in the "right-hand house" as its heir. The court upheld the appointment. Wellem died, and the Court further held that Wellem's children were heirs to the "house" in which their father had been placed. These children were born after Wellem's death as the result of his widow being "ngenaed" to one of his brothers.

In another case³⁸ the facts showed that there was no heir to the "right-hand house" of a deceased native, as the only son of that "house" had been killed. The "right-hand wife" thereupon asked the principal heir of her late husband (*i.e.*,

31. *Molefe vs. Ntebele* (Basutos), K., 1907; H., p. 167.

32. *Sibozo vs. Notshokovu*, B., 1908; H., p. 198.

33. *Tsweleni vs. Nyila* (Pondos), F., 1909; H., p. 256. *Mgqongwa vs. Sikemane*, K., 1909; H., p. 252.

34. *Mgqongwa vs. Sikemane*, K., 1909; H., p. 252.

35. *Tsweleni vs. Nyila* (Pondos), F., 1909; H., p. 256. *Mgqongwa vs. Sikemane*, K., 1909; H., p. 252.

36. *Ibid.*

37. *Mphomane vs. Mphomane*, K., 1905 (Basutos).*

38. *Mgcinq vs. Sinxoto*, K., 1905.

the eldest son of his "great house," who had also, under the circumstances, inherited the property of the "right-hand house") to "give her a son," as her boy was dead. The heir, after consulting his relations, thereupon placed his own second son in the "right-hand house." This boy then lived there, and was considered a son of that "house." His wife's dowry was paid from the property therein, and he controlled the administration of its estate. Upon the death of his father, it was held that he was heir to the property in such "right-hand house," and that his father had acted in accordance with custom, which allowed him a very free hand in such matters.

In another case³⁹ it appeared that two of the above-mentioned courses were adopted in turn by a native. In the first instance, he placed another woman in his "great house" (which was heirless); but as she also had no son, a youth from another house was then put in it as heir. The Court held that this boy was heir to the "great house" by virtue of his having been placed in it as such.

Part IV.—*Directions to be carried out after Death.*

Under Native law a father may direct how his property shall go amongst his children at his death,⁴⁰ and the Court will not interfere with his arrangements unless it can be shown that the disposition is improper.⁴¹ Such disposition of property by a native is not in conflict with custom, but supports it,⁴² the chief object being to confirm settlements already made, and to make provision for such "houses" as are not already provided for.⁴³

The Appeal Court at Kokstad said⁴⁴ that Native law allows Basutos, and natives of other tribes, to arrange how their stock shall be divided amongst their children after their death, and that the usual way in which this is done is for the owner of the stock to call a meeting of his relatives and friends, and inform them of his wishes. In the case quoted, it was unsuccessfully contended that a Basuto had not the privilege of thus distributing his property. The deceased native (so the record shows) had

39. *Sotshangana vs. Diamond*, K., 1905.

40. *Xabalena vs. Mpongwana*, U., 1908; H., p. 170.

41. *Ibid.*

42. Expert evidence in *Sekeleni vs. Sekeleni*, J. 21, p. 118.

43. *Ibid.*

44. *Mphomane vs. Mphomane*, K., 1907; H., p. 166.

directed that his estate in his "great house," which was very rich, should be divided after his death between the two eldest sons of that house. The natural heir (the eldest son) refused to divide the property, but was compelled to do so by order of Court.

Part V.—*Disinherison.*

Under Native custom a father may, for good and sufficient reason, disinherit any of his sons, and, as the result, such son cannot claim his inheritance.⁴⁵ The repeated refusals by a son to acknowledge his father's ownership in the property allotted to his mother's "house" has been held to be a sufficient cause for disinheriting him.⁴⁶

The proper procedure for a native who wishes to disinherit a son under Native law is to call a meeting of the chiefs and principal men of his clan, and to state publicly that from that date he discards and disinherits his son, giving his reasons for doing so.⁴⁷ The disinheritance need not be final, for such son may thereafter be publicly reinstated.^{48 (B).}

Disinherison may be effected by will.⁴⁹

The mere fact that a son has been ordered to set up an establishment of his own, and to leave his father's kraal, does not in any way imply that he is disinherited. The object of such step is merely to relieve the father of his liability as kraal-head for the son's actions.⁵⁰

45. *Maqetseba vs. Mgwaqaza*, U., 1907; H., p. 163. *Mnyamana vs. Potwana*, K., 1906.* *Mbono vs. Sifuba*, K., 1907; H., p. 137.

46. *Mfenqa vs. Tshali*, K., 1900; H., p. 31.

47. *Mnyamana vs. Potwana*, K., 1906* *Mbono vs. Sifuba*, K., 1907; H., p. 137.

48. *Mnyamana vs. Potwana*, K., 1906.*

49. *Maqetseba vs. Mgwaqaza*, U., 1907; H., p. 163. *Sigidi's executor vs. Matambu*, J. 16, p. 497.

50. *Mkeqo vs. Matikita*, U., 1909; H., p. 242.

(B) *Addendum*.—By Sec. 11, Proc. 142 of 1910, it will be lawful for a native (provided he is a native to whom that Proclamation will apply) desiring to disinherit his heir, either wholly or in part, on the ground of gross misconduct, incapability, or insanity, to proceed against such heir in the Resident Magistrate's Court, by way of summons, to have him declared disinherited, and to have another heir appointed in his stead. Under this section it will also be lawful for either party to the action, upon the cause which had led to the disinheriting order no longer existing, to apply to have the order set aside. As regards the effects of such orders, rights of appeal, etc., see the section referred to.

CHAPTER XII.

ADMINISTRATION AND DISTRIBUTION OF ESTATES OF DECEASED
NATIVES UNDER NATIVE LAW.Part I.—*Principal Heir: Duties, Rights, &c.*^(A)

When a native dies leaving one or more wives, but only one heir, his estate is administered by that heir, or, if he be too young, by his guardian.

In the administration of an estate, as far as its creditors and debtors are concerned, the heir is looked upon as the sole administrator of the property of the various "houses." He sues, and is sued by, third parties as heir to the estate,¹ irrespective of which particular house the matter concerns.

The onerous duties and obligations of an heir (or his guardian) towards the deceased man's widows and children are dealt with in Chapter XIII.

In the event of there being two or more establishments, each with an heir to it, the position is not so simple.²

The principal heir, generally the eldest son of the deceased's "great house," is responsible for the carrying out of the latter's instructions and wishes as to the disposition of his property; and, if such heir fail to make proper distribution of the estate, he may be sued by the injured claimants.³

Part II.—*Heirs to "Houses" other than the Principal Heir.*

Should the eldest son of any wife be a major at the death of his father, he immediately takes possession of the property

1. *Vide* Cakile *vs.* Tulula (Bacas), K., 1908; H., p. 201.

2. *Vide* Part IV. of this chapter.

3. Mphomane *vs.* Mphomane, K., 1907; H., p. 166. Mdebele *vs.* Mdebele, K., 1902.* Daniso *vs.* Mzingeli, F., 1903; H., p. 67.

(A) *Addendum*.—As to the liabilities imposed upon the principal heir according to Native custom under Proc. 142 of 1910; see note on p. 8.

of his mother's "house," for he is guardian of his mother and of her children.

Should he receive those dowries of his sisters which by virtue of allotment belong to other members of his father's family, he would be the proper person from whom to claim them.

He should put forward all claims against his father's estate at the time the principal heir is distributing it in terms of his father's will; for should he permit a division of such estate to take place without objecting at the time, and accept a smaller share of it than he afterwards alleges he was entitled to, he is considered to have waived his rights to any further claims, and is debarred from demanding more.⁴

That the Court looks with suspicion upon claims brought forward after alleged usurpation of rights, where such alleged usurpation had taken place without protest at the time, is also seen from the cases of *Sotshangana vs. Diamond* (K. 1905), and *Cheka vs. Cheka* (K. 1905).

Should any other member of his father's family become possessed of the property of his mother's "house" he would be the right person to institute proceedings for recovery.⁵

Part III.—*Heirs under Age: Guardians.*

During the minority of the heir of the "great house," the estate inherited by him, as well as himself, his mother, and his full brothers and sisters, are all under the guardianship of his nearest male major relative through his father.⁶ Such a guardian would, therefore, be the eldest son of the "house" allied to the "great house," or in default of such a son, the eldest son of the other "houses" of the deceased in order of rank. Failing any such sons, the eldest brother of the deceased would take the office, and so on; the guardianship devolving in precisely the same order as the estate inherited by the minor would go in intestacy.

The Courts have several times held the eldest brother of a deceased native to be guardian of his widow and of his minor heir.⁷

4. *Khatatsa vs. Makatisi*, K., 1903.

5. *Nyakata vs. Dabula*, K., 1903.

6. *Magwaxaza vs. Nomkazana*, U., 1903; H., p. 66.

7. *Ntengu vs. Ntshinga*, K., 1905. *Mdungazwe vs. Mabacela*, K., 1908, H., p. 219. *Nohafisi vs. Jali*, U., 1908; H., p. 174.

Such paternal relative may sue to be declared guardian of the minor heir⁸ and for possession of his estate.⁹

Thus, in one case,¹⁰ the father of a deceased man successfully sued the guardian of his son's widow (a) to be declared guardian of her son, and (b) for the delivery of her late husband's estate. The widow's own family contended that she was not married to Plaintiff's son, and had refused to part with the boy or the property.

During the minority of the heir, his guardian, in his capacity as such, is the proper person to sue, and to defend actions brought in respect of the estate inherited by his ward.¹¹

A guardian may transact the business of his ward's estate, and can validly dispose of property therein without the latter being present during the transaction.¹²

The guardian is in the position of a trustee, and, when his ward reaches majority, is bound to hand over the estate to him, together with an account of its administration.¹³

It is customary for a guardian to consider his ward a minor until he marries, on which event, according to Native custom, he becomes a major, and entitled to the custody of his estate. However, the Appeal Court at Kokstad has held¹⁴ that a guardian may not sue on behalf of an unmarried ward who is a major under Proclamation. Therefore, it may be fairly inferred that, on a minor heir reaching the age of twenty-one years, he would be entitled to possession of his estate, since the guardian is then deprived of his power to administer it fully.

A native who is not the natural guardian of a minor heir cannot assume that office under the verbal authority of the late owner—even with the natural guardian's consent—but must be appointed either by will or by order of Court.¹⁵

In the event of a son and heir of a house of lesser rank than the "great house" being under age at the death of his

8. Nonyama *vs.* Ntshwayiba, K., 1907.*

9. Nohafisi *vs.* Jali, U., 1908; H., p. 174.

10. Geba *vs.* Dokolwana, K., 1906.

11. Lehloeka *vs.* Ranyenyele, K., 1907. Ntengu *vs.* Ntshinga, K., 1906. Nonyama *vs.* Ntshwayiba, K., 1907.*

12. Sinyoto *vs.* Kunyana, K., 1906.*

13. *Ibid.*

14. Jafta *vs.* Jafta, K., 1906.

15. Mdungazwe *vs.* Mabacela, K., 1908; H., p. 219.

father, his inheritance, together with his mother and her family, is under the guardianship of the heir to the "great house";¹⁶ provided that the "house" to which the minor heir belongs is not allied to another "house," in which case the eldest son of such allied "house" would be guardian; *e.g.*, the major son of a "qadi" to a "'right-hand' house" would be guardian of the minor son of such "'right-hand' house" in preference to a son of the "great house."

In the same way, should a son be born of a "ngenaed" widow of an heirless "house" (other than the "great house") he would, while a minor, be under the guardianship of the principal heir,¹⁷ or of the heir to an allied "house," as the case might be.

Should the principal heir, after the death of his father, refuse to recognize the rights of a minor heir born thereafter, the mother of the latter, or the widow of any "house" whose property he should inherit, may institute an action for a declaration of rights on his behalf.¹⁸

Likewise, a widow of any "house" may prevent the great heir of her deceased's husband's estate from wrongfully claiming or misappropriating the inheritance belonging to the minor heir of her "house."¹⁹

The fact that a widow has been "ngenaed" does not affect the administration of her late husband's estate. The "ngenaing" man has no right over the estate at all, except where no heir exists.²⁰ He is not the guardian of the woman, or of her children, or of the estate of her late husband; all of these remain under the tutelage and control of the heir or his guardian.²¹

All actions relative to the estate are brought, and defended, by the heir; and he is the only person who may sue for damages

16. *Magwaxaza vs. Nomkazana*, U., 1903; H., p. 66.

17. *Vide Mxongwana vs. Tshaka*, K., 1906,* and *Molefe vs. Makanane Ntebele*, K., 1907; H., p. 167.

18. *Noseyi vs. Gobozana*, B., 1908; H., p. 214.

19. *Nosenti vs. Sotewu*, B., 1909; H., p. 117; W., p. 27. *Magwaxaza vs. Nomkazana*, U., 1903; H., p. 66.

20. *Matia vs. Moalosi*, K., 1906.* See Chapter v., Part vi. *Thakudi vs. Jacob*, K., 1905.*

21. *Ibid.*

for adultery committed with the "ngenaed" widow by unauthorized third parties.^{(B) 22}

Part IV.—*Extent of Heir's Liability for Estate Debts.*

There are two kinds of debts which may become due by an heir in connection with the estate he inherits, *viz.*: (a) Those arising out of transactions entered into by the deceased owner—as, for instance, a claim for a return of dowry paid to the latter; and (b) those due in respect of transactions entered into by the heir himself after he comes into the estate—as, for instance, a claim for return of dowry paid to the heir for an inherited girl.

In the former transactions the heir is liable only in his capacity as such: in the latter he is personally liable.

Thus, the Court, while giving judgment against an heir of an estate for a debt incurred by the deceased, said that it was to be understood that the Defendant was liable in his capacity as heir, and his liability only extended in so far as the estate could meet it.²³

Again, where a native had signed an acknowledgment of debt in his capacity as heir to an estate, judgment was given against him in that capacity only.²⁴ The Court stated that his private property was not executable, as, according to custom, he was liable for such debts only in so far as the property inherited could meet them.

In the event of there being one or more establishments, each containing an heir, the question arises whether the husband of a deserting wife should sue the principal heir, or the heir of the "house" in which the woman was born, for the return of the dowry, paid to her father, when the desertion has taken place after the death of her father.

The further question arises whether an absent creditor of a deceased native after the division of the latter's estate by the principal heir, should sue the heir of the "house" in respect of which the debt was due, or the principal heir.

It will be seen that, if the principal heir inherits a major

22. *Matia vs. Moalosi*, K., 1906.*

23. *Sidona vs. Kaziwa*, K., 1906.*

24. *Ngcaba vs. Vabaza*, K., 1905.

(B) Amongst the Pondos, the "ngenaing" man may sue in adultery cases. *Vide Nonkanesa vs. Mosani*, U., 1906; H., p. 45.

portion of an estate, and the heir of the "house" by which the debts are due a portion of it insufficient to meet the liabilities, manifest injustice would be done the creditors if their recourse lay against the heir of the latter establishment. It is therefore the custom of natives to assume that the great heir "stepped into the deceased man's shoes," and is liable for all debts due by him. The great heir does not suffer hardship, for he has his recourse against the heir of the hut by which the debt is due.

However, circumstances may arise which render it necessary for a creditor to proceed direct against the heir of the debtor "house," and equity, rather than hard-and-fast rules, indicates which action should be taken.

Thus, where²⁵ the evidence shewed that a daughter of a second "house" deserted her husband, whom she had married before her father's death, and that her dowry had been paid by her husband to her father and the heir of her mother's hut jointly, judgment was given against this heir on his being sued by her husband for return of dowry.

25. *Mate vs. Nopongo, K., 1902.*

CHAPTER XIII.

RIGHTS OF WIDOWS AND DAUGHTERS UNDER NATIVE LAW IN AND TO ESTATES OF DECEASED HUSBANDS AND FATHERS. (A)

Part I.—General.

A woman cannot inherit property.¹ According to strict Native law, a widow is herself the "property" of her late husband's heir.² She cannot inherit, even if no male heir to her husband's estate exists.³

There seem to be two exceptions to this general rule, for a widow is entitled to keep, as against her late husband's heir and his creditors, stock given to her (a) as "breast cattle" from the dowries of her daughters,⁴ and (b) for services to her husband's kraal. For instance, a beast is sometimes given to a "qadi" for her services in rearing the children of the major house to which she is attached.⁵ These latter gifts, however, are very unusual.⁶

Daughters, likewise, cannot inherit, even if no male heir to an estate can be found.⁷

1. Myazi *vs.* Nofenti (Fingos), B., 1904; W., p. 3; H., p. 74. Madolo *vs.* Nomanda (Nomavu), B., 1896; W., p. 3; H., p. 12.

2. Maclean's Compendium, p. 74. *Vide* Chapter "Widows."

3. Walter E. M. Stanford's evidence in *re* Sekeleni *vs.* Sekeleni, *supra*. Nongwe *vs.* Sibidla, K., 1906.*

4. Mhlakula *vs.* Elizabeth, K., 1902; H., p. 56.

5. Monelo *vs.* Nole, U., 1906; H., p. 102.

6. *Ibid.*

7. Nongwe *vs.* Sibidla, K., 1906.*

(A) As regards a widow's rights to the use and occupation of immovable property held under Proc. 227 of 1898, see that Proclamation and Proc. 142 of 1910.

The position of the widow and children in a kraal under Native law, and the heir's duty towards them, are fully described by Colonel Stanford in his expert evidence in the case of *Sekeleni vs. Sekeleni* (J., 21, p.118), where he said: "A widow would, with her children, come under the guardianship of her eldest son. If such son were of age, she would live with him, or at a place he desires; and, during the time she recognizes his authority, it would be his place to provide her and her children with necessary maintenance in keeping with her position; to give her land to cultivate, and to lend her cattle with which to plough. She and her children would have to render him in return such services as are usually rendered by a wife to a husband, and by children to a father. Failure on the part of a woman, or children, to recognize the eldest son's authority would have the effect of depriving them of any claim for maintenance and support. But so long as they render him such services, and behave dutifully to him, they are entitled to maintenance out of the estate of the deceased; and if the eldest son neglects to make sufficient provision for them, or otherwise ill-treats them, an independent chief, upon sufficient ground shewn, might allow the mother to establish a separate kraal, with stock taken from the estate for her maintenance, and place her under guardianship of another guardian, usually a son or near relation. The widow would only have the use of such stock, the ownership being vested in the son."

The Supreme Court, therefore, in awarding the estate in dispute to the deceased native's eldest son and heir (according to Native custom), said that he was entitled to possession, subject to the onerous obligations imposed upon him in favour of his father's widow and other children.

These obligations compel an heir (or his guardian), while administering an estate, to share joint possession of it with the widow of the deceased man, for she has a life interest in the property,⁸ and Native law permits her to hold it to ensure her and her family being supported therefrom.

Should the heir reside away from the widow, or should she be allowed to establish a kraal of her own, he leaves the estate in her hands, appointing another man to look after it, and to act as his "eye"; for the widow, although entitled to possession, may not remove any property from the control of her late hus-

8. *Noseyi vs. Gobošana*, B., 1908; H., p. 214.

band's heir or people.⁹ She has no right to remove the children and property of her late husband to her own people's kraal.¹⁰

The procedure adopted by natives to safeguard the interests both of the widow and of her husband's heir is described in a Pondoland case,¹¹ where the native assessors stated that an inheritance is left with the widow,^(B) who may do nothing with it without consulting the heir; that the cattle are eaten at her kraal by the heir, who, in the disposal of them, or if he wishes to marry and get the dowry from the stock of her house, first consults the widow; and that the day on which the heir gets sole control of the estate is the day on which the widow dies.

The fact that the widow has consented to be "ngenaed" does not affect the procedure adopted, as is also seen from the expert evidence in the same case.¹²

If a widow improperly disposes of the stock of the estate without the heir's consent, he can apply to Court for such order as to the custody thereof as may be necessary under the circumstances.¹³

Should a widow (with or without intent to defraud the heir out of his inheritance) dispose of the property belonging to her husband's estate, Native law does not permit the heir to recover it from *bona-fide* third parties, as they may legally presume that she has the heir's authority. However, if a third party knew that the heir had not been consulted, and that the disposition of the stock had been made to defraud the heir of his inheritance, and had not been effected for the benefit of the estate or widow, he (the third party) could be compelled to restore it.¹⁴ The record in the case quoted shewed that a widow had disposed of the inheritance left by her late husband in order to give the proceeds to an unsuccessful claimant to the heirship of the estate, whose side she had taken in the dispute.

9. Noseyi *vs.* Gobošana, B., 1908; H., p. 214. Gqumayo *vs.* Ziyokwana, U., 1909; H., p. 231.

10. Nohafisi *vs.* Jali, U., 1908; H., p. 174. Gqumayo *vs.* Ziyokwana, U., 1909; H., p. 231.

11. Nonkanyezi *vs.* Mosani, W., p. 451. Reported in Henkel, p. 114, as Manyosine *vs.* Nonkanyezi, 1906.

12. See Chapter v., Part vi.

13. Magwaxaza *vs.* Nomkazana, U., 1903; H., p. 66. Manyosine *vs.* Nonkanyezi, U., 1906; H., p. 114.

14. Ntebele *vs.* Madapuma, K., 1908.*

(B) If the estate exceeds her requirements, she might be obliged to waive possession of the surplus. See Mulunga *vs.* Sihlwa, K., 1907.

A third party, knowing all facts, bought the stock. He was ordered to return the cattle to the rightful heir.

That no other members of the kraal besides the widow have the right to dispose of the estate's property without the heir's consent, or the consent of the widow, is also clear from the judgment in the case referred to.

It will be seen that the procedure of allowing a widow to hold the estate jointly with the heir is one which, to a great extent, enables both parties to keep watch over each other; and so long as all goes well, and both sides do their duty to one another, this state of things continues.

A widow is entitled under Native custom to demand maintenance from the heir only so long as she acknowledges his authority and tutelage over her.¹⁵ This is so, notwithstanding the fact that she has now by Proclamation been constituted a major, and cannot be compelled to obey him.

Thus, where a widow had received the dowry for her late husband's daughters, whom she had taken with her on deserting him, it was held¹⁶ that she had no right to keep such dowry, and she was ordered to hand it over to her late husband's heir.

Again, where a widow had left the guardianship of her father-in-law, taking with her the property and children of her husband's estate, the Court held that she was entitled to the property for maintenance only so long as she remained with her deceased husband's people.¹⁷

On a widow's marrying again, she no longer remains under the tutelage of her first husband's heir, and cannot look to him for maintenance.¹⁸ She must claim support from her second husband;¹⁹ for she is no longer looked upon as a "wife" of the kraal of her first husband, whose heir has the right to claim back the dowry paid on her first marriage.²⁰

Thus, it was held, in the case last quoted,²¹ that a woman, whose first husband's heir was unknown, and who had, on becoming a widow, resided at her natural guardian's kraal and under his tutelage, could not, on marrying again, claim from this guardian the estate of her late husband. She was not

15. Walter E. M. Stanford's evidence in *Sekeleni vs. Sekeleni*, J., 21, p. 118.

16. *Sententeni vs. Nolanti*. U., 1901; W., p. 38; H., p. 43.

17. *Nomfokazana vs. Nompikелеli*, K., 1906.

18. *Nongwe vs. Sibidla*, K., 1906.*

19. *Ibid.*

20. See Chapter v.

21. *Nongwe vs. Sibidla*, K., 1906.*

allowed to retain the dowries of the daughters of her first marriage. The Court stated that her natural guardian was the proper person to have the custody of the estate, and of the daughters, until the heir arrived; and that, if no heir could be found, the estate would belong to Government.

This judgment is a far-reaching one, for it follows that not only has a widow, on marrying again, no further right to her first husband's estate, but also that her second husband cannot inherit through her; nor can her own people claim the estate, except to hold it pending the arrival of the rightful heir.

Should, however, the heir of a woman's first husband not reclaim, on her marrying again, the dowry paid on her first marriage, and should the woman return to, and be accepted by, him on the death of her second husband (thus debarring himself from claiming the return of her first dowry), her first marriage would, on the second husband's heir recovering the dowry paid on the second marriage, be looked upon as revived.²³ In such a case, she would be entitled to claim maintenance from her first husband's heir in the same way as if she had never left him.

Under Basuto custom, the power of the "great wife" over the estate of her late husband is very marked. In one case,²⁴ expert evidence relied on by the Court shewed that the estate vested in her, and that the heir did not actually inherit until after her demise.

However, this view has been modified in other cases,²⁵ which shew that, although the power of a Basuto widow is, in fact, very wide, it is, in law, no greater than that of widows of other tribes.

Part II.—*Abandoned Wives' Rights.*

An abandoned wife is entitled, under certain circumstances, to support from her husband's estate after his death,²⁶ but she usually claims maintenance from her own people.²⁷

In one case bearing on this point, the facts shewed that, on a woman being deserted by her husband, she earned stock, and

23. *Gwente vs. Smayili*, B., 1904; W., p. 18; H., p. 71.

24. *Molemohi vs. Molemohi*, K., 1903.

25. *E.g.*, *Ntebele vs. Madapuma*, *supra*.*

26. See *Mdungazwe vs. Mabacela* (K., 1908; H., p. 219). where it was held that the fact that a wife had been "smelt out" and driven away shortly before her husband's death did not deprive her of her interest in his estate.

27. See Chapter iii.

supported herself and his daughter; that, subsequently, she set up a kraal of her own; that her husband died, and she was abandoned by his people until the marriage of the daughter, at which time she was very old. Her son (who had lived with her husband) then came forward, and pretended that he wanted to take her to his kraal. On his being told that she could not travel on foot, he said that he would send for her, at the same time going off with the dowry cattle paid for the daughter. He never returned, and thereafter the widow died. In an *obiter dictum* the Court said that the widow, had she lived, would have been entitled to the use of a fair share of the dowry cattle for her support.²⁸

Part III.—*Heirless Estates—Removal of Guardian; Disputes.*

In earlier times, disputes between a widow and the heir of her deceased husband were taken to an independent chief to settle.²⁹

In the event of there being no male heir to an estate, the chief was entitled to the custody of the deceased man's widow, family, and property.³⁰

If enmity arose between the heir and the widow, or if the heir did not treat the widow properly, or squandered the estate of her late husband, it was customary for the chief to place the widow, and a sufficient portion of the estate, under the custody of another male guardian.³¹

The Government has now taken up these duties of the chiefs, and the property of an estate, to which no male heir can be found, vests in Government.

During a case in which an inheritance was in dispute, it came to the notice of the Court that a widow was in possession of the heirless estate of her late husband. The Court allowed her to remain in possession, but stated that ownership did not vest in her. It further ordered her to be placed under the tutelage of her headman for the time being, and said that no animal in the estate should be sold without the consent of the magistrate of her district.³²

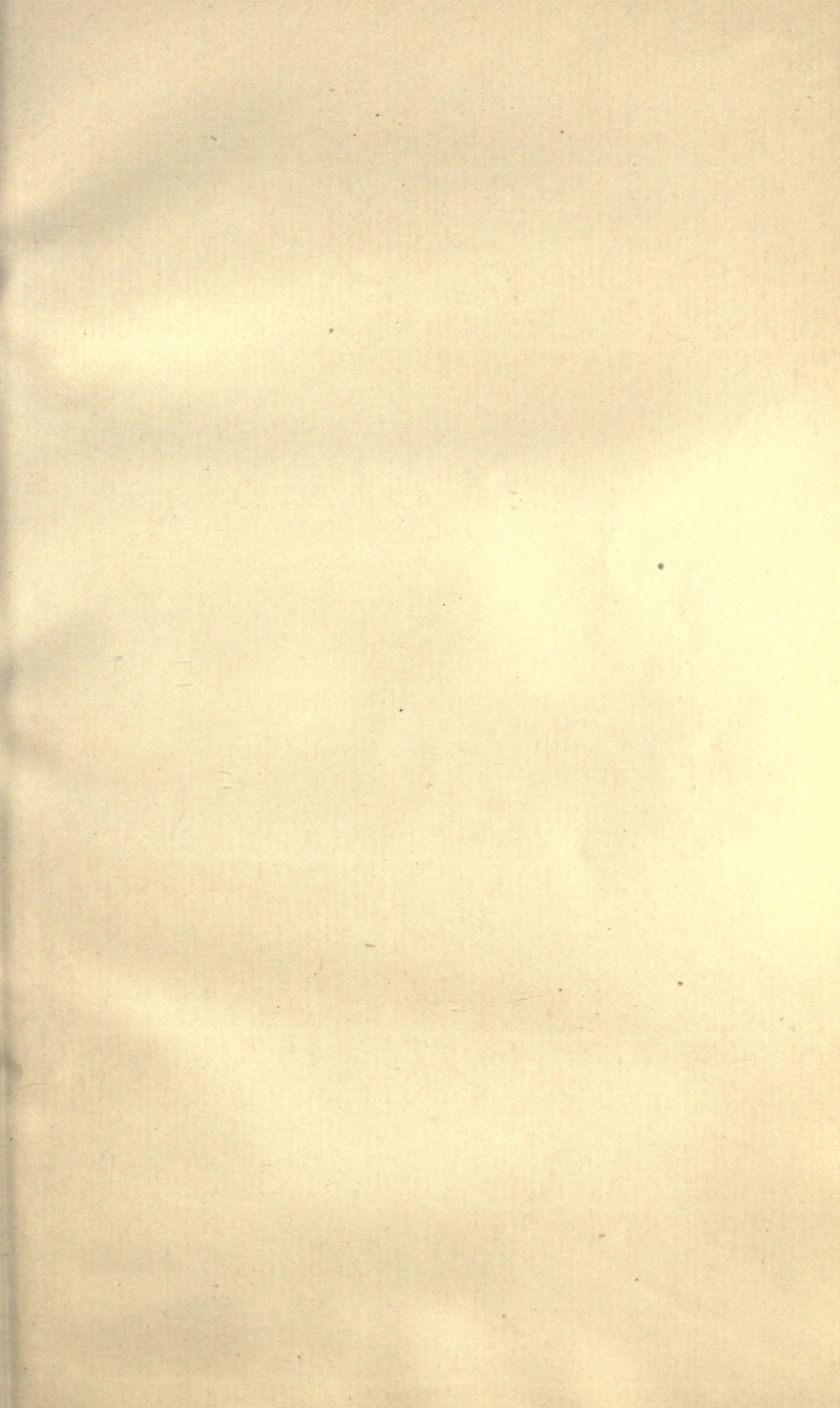
28. *Malunga vs. Sihliwa*, K., 1907.

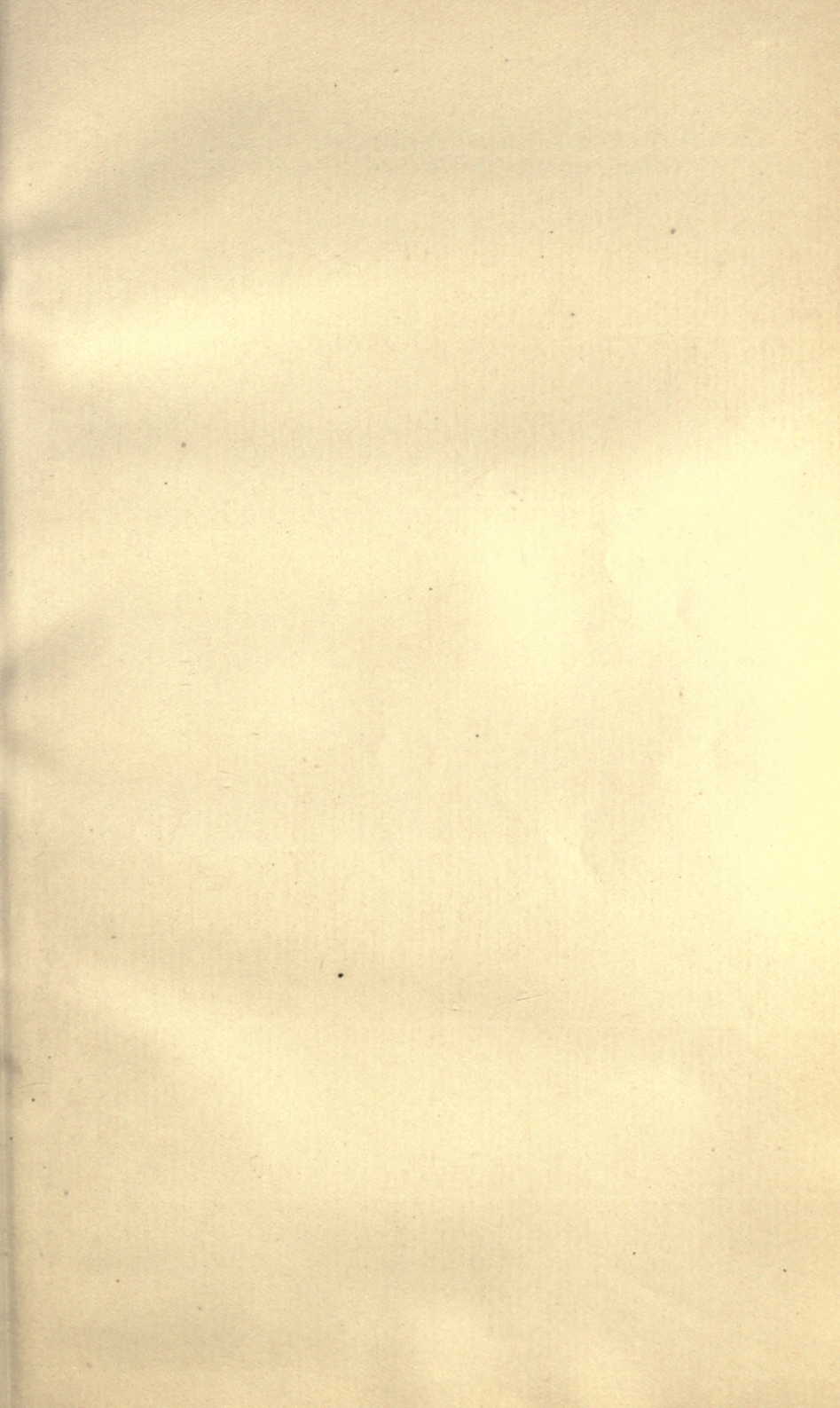
29. *Magwaxaza vs. Nomkazana*, U., 1903; H., p. 66.

30. *Myazi vs. Nofenti* (Fingos), B., 1904; H., p. 74.

31. *Magwaxaza vs. Nomkazana*, U., 1903; H., p. 66.

32. *Myazi vs. Nofenti*, *supra*.





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The case of *Madolo vs. Nomanda (Nomawu)*³³ indicates how an estate, coming to an heir who refuses to do his duty towards the widow and children of the deceased man, is now dealt with. It appeared that the heir had driven away a sister of the deceased native, or, by making her uncomfortable, had compelled her to leave him. The Court, while admitting that her brother's estate vested in the heir, deprived him of possession of it. The woman and the estate were ordered to be placed by the local magistrate under the charge of some male guardian to be selected by him, such guardian to be held responsible for her support for such a period as the dictates of humanity demanded. The number of stock comprising the estate was not stated in the judgment.

In another case,³⁴ where a widow applied to Court by way of summons (*a*) for the removal of herself and children from the guardianship of a man whose relationship is not stated in the judgment (but who was probably her husband's heir), and (*b*) for the appointment of another guardian in his place, on the ground of ill-treatment, the Court gave her judgment with costs, and appointed another guardian.

In these cases, the natural guardian, or the heir, is entitled to access to the property handed over to the newly-appointed guardian, and, should he find that the same is being improperly administered, he may apply to Court for such further order as to its custody as may be necessary under the circumstances.³⁵

33. B., 1906; W., p. 3; H., p. 12.

34. *Magopeni vs. Notyasi, K.*, 1903.

35. *Magwaxaza vs. Nomkazana, U.*, 1903, H., p. 66.

CHAPTER XIV.

HERITABLE RIGHTS OF ILLEGITIMATES, ADOPTED SONS,
AND MALE OFFSPRING OF WIDOWS.Part I.—*Classification of Illegitimates.*

In respect of their relationship to a father, or head of a kraal, there are four kinds of illegitimate sons, namely, (a) those born of the adultery of a wife of the kraal, (b) those born out of wedlock of unmarried daughters of the kraal head, (c) those begotten by the head of the kraal himself of a woman who is not his wife, and (d) those born of his widow.

Part II.—*Adulterine Sons of a Wife.*

The Appeal Court at Umtata held¹ that a son born of a wife's adultery could not inherit the property of his mother's "house," and, in the case quoted, gave the inheritance to a son of another hut of her husband. This judgment was based on Tembu expert evidence. There was no son born of the erring wife, save the illegitimate boy. The dowry for this boy's wife had been paid from the property of his mother's hut. No son from any other "house" had been placed in his mother's hut as heir. Although her husband had found on enquiry that her son was illegitimate, he had never actually disinherited him, and, on his death, this illegitimate son had taken possession of the estate of his mother's "house" as heir.

In another case,² the same Court held that an illegitimate son, born of a wife during her absence from her husband, could not inherit his property. In this case, her husband had publicly declared the son to be illegitimate, and not his heir. The Court, however, gave its decision on the simple ground that such an illegitimate son could not inherit when there was legitimate male issue.

1. Sedubulekana *vs.* Fuba, 1901; W., p. 12; H., p. 49.

2. Mtuyedwa *vs.* Baatje, 1906, W., p. 37; H., p. 116.

Another principle of Native law that would debar these illegitimates from inheriting such estates is that no male can inherit through a female line or parent.³

The Appeal Court at Butterworth, in a case⁴ in which the parties, facts, and points at issue were the same as those in the case of *Sedubulekana vs. Fuba* (*supra*), held that the illegitimate son was, according to Fingo custom, heir to the estate of his mother's husband. This Court said that the facts shewed that the deceased man had tacitly constituted the illegitimate son his heir.

There are no decisions by the Appeal Court of East Griqualand dealing with the question at issue in the above cases.

Part III.—*Illegitimate Sons of Girls.*

Sons born of seduced girls cannot inherit the estate of their mother's father, under the rule that no male may inherit through a female line or parent.⁵ They belong to the family of their maternal grandfather, unless adopted by their natural father.

However, it appears that such illegitimate sons may inherit on total failure of males related by consanguinity to their maternal grandfather.⁶

Part IV.—*Illegitimate Sons of Kraal-Head.*

Illegitimate sons cannot inherit the estate of their natural father, should he leave legitimate male issue. When adopted, they rank as younger sons of his kraal.⁷

If there be no legitimate sons, an illegitimate boy may inherit, provided his father has adopted him by (a) paying for his mother's seduction, (b) taking him home after paying maintenance cattle ("sondlo"), when necessary, to his mother's parents, and (c) bringing him up as a son.⁸

According to Pondo custom, a man having no male issue by his wives may institute as his heir an illegitimate son begotten of himself by some other woman (whether a married

3. See Chapter XIII.

4. *Fuba vs. Sedubulekana*, W., p. 12; H., p. 52.

5. See Chapter XIII.

6. *Mangqalaza vs. Ludidi Mangqalaza*, B., 1904; W., p. 20; H., p. 82.

7. *Calike vs. Tulula* (Bacas), K., 1908; H., p. 201. *Nonkobo vs. Ndunya* (Pondos), U., 1908; H., p. 211.

8. *Colis vs. Matshowana*, B., 1901; W., p. 8; H., p. 47. *Cakile vs. Tulula* (Bacas), K., 1908; H., p. 201.

woman or not). This is done by his fetching the boy to his kraal for that purpose.

In the same way, his relatives may, after his death, appoint such illegitimate son to succeed him. Even if not appointed at all, such son may establish his own claim, provided he can conclusively prove that the deceased was his father.⁹

Part V.—*Sons of Widows.*

Sons of widows may be divided into two classes, namely, (a) those begotten of a man to whom she has been "ngenaed," and (b) those begotten of a man who has not "ngenaed" her.

With reference to the former class, the Court, in the case of Nonkanyesa vs. Mosani,¹⁰ said that "considerable difference of opinion exists with regard to the heritable rights of children resulting from 'uku-ngena' unions."

They are looked upon as younger brothers of the legitimate children of their mothers, and it is only when no son or male descendant of a house exists that the question arises whether these posthumous illegitimate sons are heirs to the estate of the deceased husband of their mother.¹¹

According to expert evidence by Pondo assessors,¹² no son of a widow can inherit unless his mother is "ngenaed" by her late husband's eldest brother and heir; if the widow be "ngenaed" by any brother of the deceased man other than the eldest, their son cannot inherit. In this latter case, the deceased man's ordinary heir inherits, namely, his nearest paternal male ascendant or relative; and the son born is looked upon as the heir's younger brother.^(A) If the widow of the "great house" be "ngenaed" to her deceased husband's younger brother, and a widow of a junior house be "ngenaed" by the deceased's eldest brother, the son of this latter wife would inherit the estate of

9. Nonkobo vs. Ndunya, U., 1908; H., p. 211.

10. U., 1906; W., p. 45, reported in Henkel, p. 114, as Manyosini vs. Nonkanyezi.

11. Tsweleni vs. Nyila (Pondos), F., 1909; H., p. 256.

12. Nonkanyesa vs. Mosami, U., 1906; W., p. 48, reported in Henkel, p. 114, as Manyosini vs. Nonkanyezi.

(A) It appears from one of the precedents quoted by the assessors that an illegitimate adopted son of the deceased man would inherit in preference to a son born of an "ngena" intercourse with his widow if the latter son's father were not the deceased man's eldest brother.

her late husband, in preference to the son of the widow of the "great house."

On this evidence the Court¹³ held that a son of a widow, "ngenaed" by a man who was not a brother of her late husband, could not inherit the deceased's estate, for the reason that the man "ngenaing" had no status to confer heritable rights. The Court further said that an illegitimate brother of the deceased man could not confer this privilege.

Other tribes are not so exclusive in recognizing the heritable rights of sons born of "ngena" intercourse.

In one case¹⁴ the judgment goes far to show that, had a widow been "ngenaed" to her late husband's half-brother, their son would have been entitled to claim heirship to the estate of her deceased husband. The whole judgment hinged on the question whether the widow had been actually "ngenaed" or not. The Court held that she had not been "ngenaed."

In another case¹⁵ it was decided that a son born of a widow "ngenaed" to her late husband's eldest brother but one would inherit in preference to ascendants. The Court said that this was Basuto custom, as well as the custom of other tribes.

Again, in another case,¹⁶ a boy, born of a widow "ngenaed" to her late husband's youngest brother, was held to be heir to the deceased's estate.

The son of a "ngenaed" widow does not, "except under very exceptional circumstances," inherit the estate of his natural father.¹⁷ There appear to be no further rulings on this subject.

Regarding the second class of illegitimate sons of a widow, namely, those not born of an "uku-ngena" union, the following cases shew that such sons cannot, amongst all tribes, inherit the estate of their mother's late husband while other heirs exist.

In one case¹⁸ it was held that a son, born of a widow (not "ngenaed") by her late husband's brother, could not inherit in preference to a legitimate son of another house of the deceased man.

13. *Nonkanyesa vs. Mosami*, U., 1906; W., p. 48, reported in Henkel, p. 114, as *Manyosini vs. Nonkanyezi*.

14. *Mxogwana vs. Tshaka*, K., 1906.*

15. *Mphomane vs. Mphomane* (Basutos), K., 1905* (see record)

16. *Gqili vs. Siqangwe*, B., 107; H., p. 155.

17. *Cheka vs. Cheka*, K., 1905.

18. *Mxogwana vs. Tshaka*, K., 1906.*

In another case¹⁹ it was held that the son of a widow (formerly "great wife") by a man who was not a blood relation of her late husband, and to whom she was not "ngenaed," could not claim heirship to the latter's estate. The record shews that the estate went to the son of the deceased man's second hut. The parties were Basutos, and the Court based its decision on the expert evidence of the Basutoland Chief Letsia, who stated that a son, born of a widow from an "uku-ngena" union with a man who was not a blood relation of her husband, could not inherit under their laws; and that such son could only inherit (a) when his natural father was a blood relation of his mother's husband, and (b) when no legitimate son of the deceased existed.

However, it is clear that, in some tribes, the son of a "seed-raiser" may, in some instances, claim the estate of his mother's late husband, at any rate as against the "seed-raiser" himself; the Appeal Court sent a suit back to be heard on its merits wherein such an illegitimate child sued his natural father for such an estate. The "seed-raiser" had successfully taken the exception in the Magistrate's Court that the Plaintiff, being his offspring, could not inherit.²⁰

Among the Pandomisi, the illegitimate son born of a widow by any third party at the kraal of her late husband inherits the estate of the latter should he have died without male issue.²¹

Amongst the natives resident within the jurisdiction of the Appeal Court at Butterworth, a son of a widow is looked upon as a legitimate descendant of her late husband, provided he is born in her house. The only son who is looked upon as illegitimate is one brought up by his mother from elsewhere. These so-called legitimate sons succeed to any property to which they would have been entitled had they been the natural legitimate offspring of their mother's late husband. They inherit in preference to the legitimate sons of the other huts of the deceased, even though the latter sons may have assumed heirship of the estate on the death of their father; but, in this case, the later heir cannot call upon the earlier heir to make good anything already spent, and has only a claim for the residue.²²

19. *Molefe vs. Makanane* (Ntebele), K., 1907; H., p. 167.

20. *Manyani vs. Dubula*, K., 1905.

21. *Talase vs. Mfanta*, K., 1907; H., p. 138.

22. *Noseyi vs. Gobošana*, B., 1908; H., p. 214.

CHAPTER XV.

MISCELLANEOUS.

Part I.—*Doctors, Herbalists and Midwives.*

There is a number of Native doctors in the Territories. They hold no certificate of any kind, but, through their alleged skill in healing, are known and sought after by the Native community. For their "professional services" they exact fees in money and kind from their patients.

It is not customary for a native to pay his doctor before the cure is actually effected¹; and if the treatment is not successful the doctor gets nothing.

No action can now be taken by these uncertificated Native doctors for fees due to them for medical services and advice, as the Medical and Pharmacy Act of the Colony has been extended to the Territories.² No action lies to recover the purchase price of medicines supplied by them.³

However, the Courts of Griqualand East have always permitted uncertificated Native midwives to claim for services successfully rendered in cases of childbirth. The usual fee is a beast.⁴

Although the Court allows such claims, it will not permit a Native doctor to recover a charge for medicine sent to a woman in child-bed, where he has not personally rendered midwifery services.⁵

The Courts of East Griqualand, in the interests of public

1. Manti vs. Qalambana, K., 1902. Brownlee's notes, MacLean's Compendium, p. 126.

2. Ndevu vs. Bikani, B., 1906; W., p. 24; H., p. 108. Selani vs. Mtywaru, B., ; W., p. 15.

3. Khoso vs. Moleko, K., 1907.

4. Goniwe vs. Maxaxa, K., 1904.

5. Khoso vs. Moleko, *supra*.

safety, further allow natives to recover fees for curing persons bitten by venomous snakes.

Part II.—*Prescription.*

Debts due between natives are never prescribed according to their laws.^(A)⁶ Damages for adultery do not form an exception to this rule.⁷

Up to the time of annexation of the Territories, at any rate, natives had no means of preventing prescription from running on some debts by obtaining judgments, or acknowledgments in writing, etc.

However, a native, according to his own laws, should bring forward from time to time his claim against a debtor, and should not let the matter drop.⁸

The Courts have held that if the transaction upon which a claim is based is foreign to Native law and custom, the Colonial law of prescription applies.⁹ Thus,¹⁰ a claim for wages due for eleven years was dismissed on this ground. The Court said that natives were in a state of transition, and that, although there was no such thing as prescription under Native law, Section 5, Act 6 of 1861 must be applied to this case.

There is nothing in the Act apparently to override Native custom, except in regard to claims falling within the section specifically prescribing certain debts.

Rights of action are not prescribed by reason of their dating back before Annexation.¹¹

Part III.—*Spoliation.*

Actions for the return of property taken by force or fraud lie amongst natives; and Magistrates have jurisdiction to try such cases.¹²

6. Gwegwe *vs.* Nyuswa, K., 1906.

7. Kinki *vs.* Tonise, U., 1904; H., p. 80.

8. Mdelwa *vs.* Mvushumi, K., 1906.

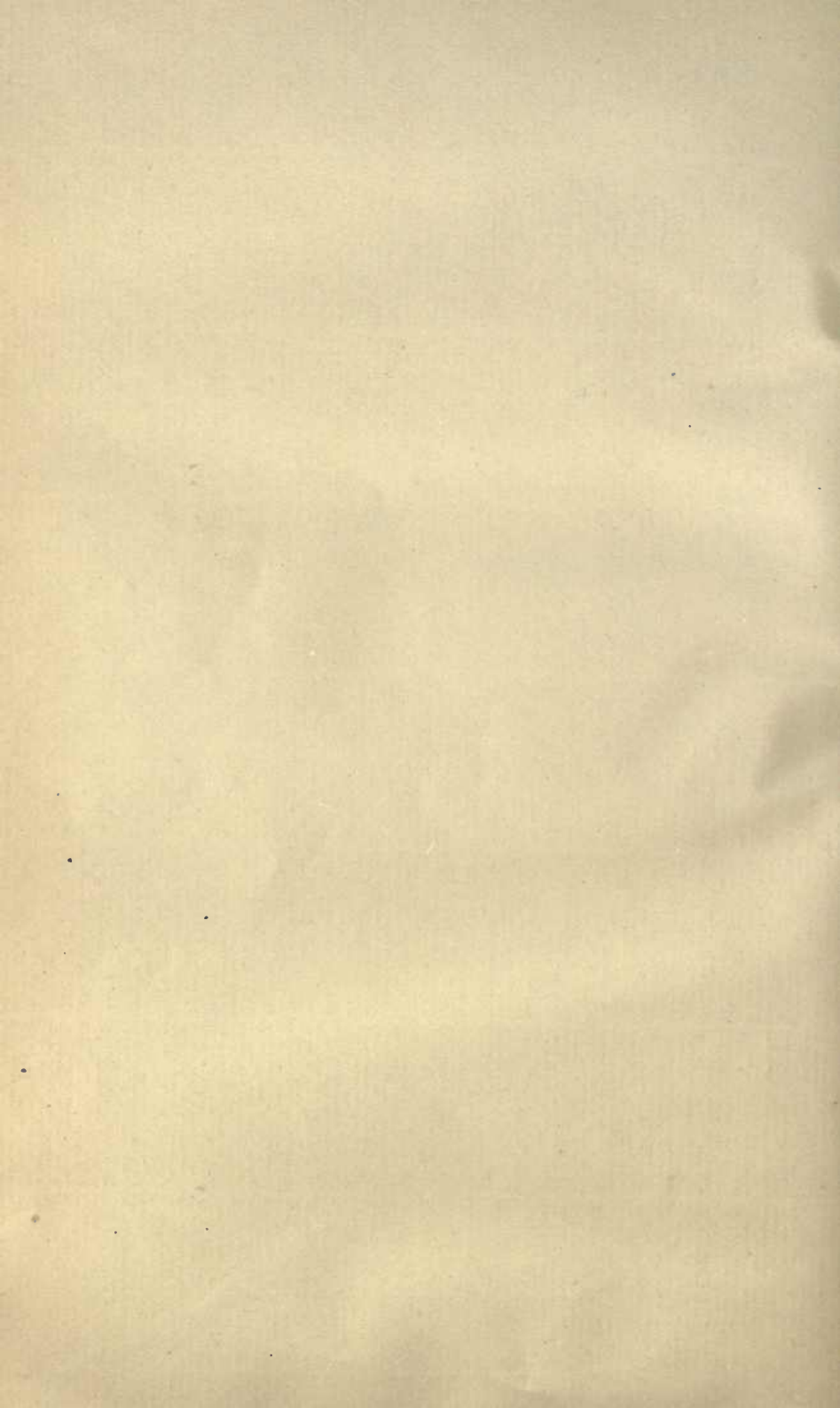
9. Molefe *vs.* Molefe, K., 1909.

10. Gwegwe *vs.* Ngaswa, K., 1906.

11. Mfuti *vs.* Nkohla, F., 1909; H., p. 227. Qubenge *vs.* Hoya, U., H., p. 249.

12. Ndamase *vs.* Sokwilibana, U., 1909; H., p. 230.

(A) Old claims are nevertheless looked upon with suspicion. See Mankankama *vs.* Sebetoane, K., 1907; and Sapula *vs.* Africa, K., 1903.





The Supreme Court held ¹³ that no court of law, whether in the Territories or in the Colony, would permit a native, whose wife had deserted him, to take back by force or fraud the dowry he had paid for her.

In the same way, it has been held that, notwithstanding any Native custom to the contrary, an "nqutu" beast cannot be seized by an act of spoliation.¹⁴

In another case,¹⁵ it was held that the fact that the wrongdoer was acting with the concurrence of his chief did not justify him in committing an act of spoliation.

In another case,¹⁶ certain men under orders from their Chief, one Zibi, forcibly took from the Plaintiff certain cattle to which Zibi was laying claim. It was held that all parties to the act (both the chief and his messengers) were rightly sued, and an order was given against them all for the return of the stock.¹⁷

Part IV.—*Slander and Libel.*

Until recently an action under Native law for damages for slander has always lain amongst the tribes of East Griqualand.

In 1905, the Court said¹⁸: "There is a mistaken idea amongst Europeans that, according to Native custom, there is no slander action. 'He has made me a thief; he must wash me; I come to you to complain,' was the form of the plaint often heard by native chiefs prior to Annexation."¹⁹

In 1908, a change of Chief Magistrates took place in East Griqualand, and the newly-appointed Chief Magistrate (Mr. A. H. Stanford) held ²⁰ that there was no civil action for slander in Native law.

13. Ngqobela *vs.* Sihele, J. 10, p. 346.

14. Mehlomane *vs.* Nkwatsha, K., 1900; H., p. 33. Mlotya *vs.* Mngayi, F., 1908; H., p. 182.

15. Bellini *vs.* Taku, E.D.C. 6, p. 201.

16. Jokozeli *vs.* Zibi, K., 1905.

17. It may be here mentioned that the Resident Magistrates of the Territories have jurisdiction to order specific performance, and to grant interdicts (see Jeke *vs.* Jantje, J. 11, p. 125; Beetje *vs.* Venter, 16 C.T.R., p. 261; Proc. 140 of 1885, Sec. 22).

18. Mbikwana *vs.* Xana, K., 1905.

19. This action is also mentioned in Brownlee's notes, MacLean's Compendium, p. 123.

20. Sonca *vs.* Molosi, K., 1908.

The Appeal Courts, at Butterworth and Umtata, have also ruled that, according to Native custom, no action lies in these cases.²¹

However, although Native custom might not have permitted civil slander actions, the Courts have allowed them to be brought under Colonial law. In the case of *Sonca vs. Molosi (supra)*, the Court said that, although no action for slander lies according to Native custom, the Magistrates are not bound to try every case between natives according to their laws; that Sec. 23, Proc. 112 of 1879 directs that all suits shall be dealt with by Magistrates according to the laws in force in the Colony proper; and that, although this section also provides that cases between natives may be tried according to the laws and customs of their tribes, the intention of its wording was, primarily, that Colonial law should apply as far as possible; but that, in order to meet special cases, provision was made whereby Magistrates might try them according to Native custom; that the Magistrates' discretion under this section was a judicial one; that it followed that, where there is no remedy for an evil under Native law, Colonial law must be applied; and that, in cases of libel and slander, Magistrates should, for these reasons, be guided by Colonial law.²²

In another case,²³ the Court said that, as the Magistrate had elected to try the action under Colonial law, it would not disturb his finding. The Court further suggested that Magistrates should state on record under what law they elect to try slander cases.

Although a Magistrate has power to choose whether he will try a slander action by Native custom and throw it out, or whether he will decide the case under Colonial law and go into the merits, it is clear from the case of *Poney vs. Nyeleka* (4 J, 219) that this power given to a Magistrate is a judicial one, and the Appellate Court is not bound by his choice.

In the case of *Bangani vs. Delihlazo (supra)*, the facts shewed that the Defendant, having traced a spoor of a stolen

21. *Bangani vs. Delihlaza*, B. . . ; W., p. 6. *Nkwana vs. Nonqanaba* (Tembus and Gcalekas), U., 1904; H., p. 79.

22. See also *Nkwana vs. Nonqanaba* (U., 1904; H., p. 79), where the Court ordered a slander case (wherein Plaintiff alleged that his wife had been accused of being an immoral person) to be tried under Colonial law.

23. *Bangani vs. Delihlaza*, B. . . ; W., p. 6.

animal to Plaintiff's kraal, persisted in saying that the latter was the thief. The Appeal Court said that cases of this kind would be more suitably dealt with under Native law, thereby avoiding interference with the system adopted by natives in searching for their stolen property.

What might be thought a slander by Europeans might not always be considered defamatory by natives; and, further, in assessing damages, the conditions obtaining amongst natives must be taken into consideration.²⁴

Part V.—Assault.

In olden times, actions for injuries to the persons and reputations of natives could only be brought in criminal form before the chief, who inflicted a fine, or made the wrongdoer pay a "cleansing beast" to him, for hurting him through the injured man.^{(B) 25}

The chief, on receipt of the fine, gave the injured native a present out of it, if he felt disposed to do so.²⁶

As far back as 1885, the Supreme Court, while holding that a Magistrate had not injudiciously exercised his discretion by trying a civil case for assault according to Native law, and dismissing it on the ground that the accused had already been tried and criminally convicted for the assault, said that it expressed no opinion as to what its judgment would have been had the suit been a "special case for damages for doctor's bills, or for expenses actually incurred by the injured party in consequence of the assault."²⁷

That natives may sue civilly for damages for assault has since been definitely decided. In laying down that this was so, the Court in one case²⁸ said: "Natives in these Territories are in a transition state, and are fast adopting European habits in their mode of life, and this Court is of opinion that, even in assault

24. *Sonca vs. Molosi*, *supra*.

25. *Nkwana vs. Nonqanaba*, U., 1904; H., p. 79. MacLean's Compendium, p. 64.

26. *Nkwana vs. Nonqanaba*, U., 1904; H., p. 79.

27. *Poney vs. Nyeleka*, 4 J., 219.

28. *Hlambiso vs. Ngqindwa*, K., 1907.

(B) The East Griqualand Appeal Court did not formerly look upon these actions as being wholly of a criminal nature (see *Mbikwana vs. Xana*, K., 1905, and *Kolobeni vs. Mpambaniso*, K., 1905).

cases, the aggrieved party should be allowed to claim damages, provided the Magistrate decides to try the case according to Colonial law, which he has the right to do under Sec. 23 of Proc. 112 of 1879."

It is customary throughout the Territories for Magistrates, in criminal cases, to award (under Sec. 17, Act 24 of 1886) to the injured man the fine, or portion of the fine, imposed upon the guilty party²⁹; but this does not now prevent a civil action being thereafter instituted by the complainant for damages.³⁰

Part VI.—*Malicious Imprisonment.*

Actions for damages for malicious imprisonment are similar to those for slander and assault,³¹ in that they are instituted to remedy an injury to the person and reputation of a native.

In sending a case back to be tried on its merits, the Appeal Court said that an action for damages for malicious imprisonment does lie between natives. The case came up again before the same Appeal Court in 1906, when the judgment of the Magistrate, who awarded £10 damages, was upheld. The record of the case shewed that the Defendant had maliciously misinformed the police, and caused the arrest of the Plaintiff on a charge of sheep stealing. Plaintiff had been confined in jail, and, on being brought to trial, had been found "not guilty."³²

Part VII.—*Arson.*

An action for damages caused by arson lies in Native law. This is a crime against the property, and not against the person, of a native, and the barriers often raised in actions for personal injuries do not apply.³³

Part VIII.—*Actio Vindicatio.*

This action lies amongst natives. Thus, where a Defendant, when sued by the owner of a beast for its delivery, pleaded that

29. *Mfeketo vs. Madondile*, U., 1906; H., p. 130; 17 C.T.R., p. 259.

30. *Ibid.*

31. *Kolobeni vs. Mpambaniso*, K., 1905.

32. *Mbikwana vs. Xana and ano.*, K., 1905.

33. *Hlambiso vs. Ngqindwa*, K., 1907.

he had earned it as wages from some third party, the Court ordered the animal to be returned to the Plaintiff.³⁴

Part IX.—*Appeals from the Resident Magistrates' Courts of the Territories.*

There is no appeal to the Supreme Court, or to the Eastern Districts Court, of the Colony when all the parties to a suit are natives, even if the question at issue is not one of Native law.³⁵ The Native Appeal Courts have appellate jurisdiction in such cases.³⁶

These latter Courts, however, have no jurisdiction to review. All reviews from the Magistrates' Courts—including those in reference to taxation of bills of cost—must be taken to one of the Superior Courts of the Colony.³⁷

When one (or all) of the parties to a suit is a European, an appeal may be taken to the last-mentioned courts only.³⁸ However, when a European is a party to an action only in his capacity of Executor to a native's estate, and a native is the other party, an appeal lies only to the Native Appeal Courts. The Supreme Court has no appellate jurisdiction.³⁹

Further, it has been held that no appeal lies to the Courts of the Colony proper in an action between a coloured man and a native, as a coloured man is not a European.⁴⁰

All appeals from the Magistrates' Courts, whether to the Native Appeal Courts or the Superior Courts of the Colony proper, may be lodged within fourteen days from the date of judgment.⁴¹

When an appeal, in an action between natives, has not been lodged within the time allowed, leave to appeal may be applied for in the Native Appeal Courts having jurisdiction.

In one case leave was granted where the agent of the appli-

34. *Rolobele vs. Mpongo*, K., 1906.

35. *Mgambana vs. Bulubulu*, A. 9, p. 485.

36. *Lutseti vs. Ben*, C.T.R. 7, p. 225 (1897), Act. 27 of 1894, Sec. 3.

37. *Makaza vs. Mbeki*, B., 1907; H., p. 154.

38. Act. 27 of 1894, Sec. 2.

39. *Barker N.O. vs. Mohatla*, K., 1906. *Mohatla vs. Matla*, 15 C.T.R., p. 869.

40. *Manquina vs. Jonas*, J. 24, p. 606.

41. *Nourse vs. Kelly*, J. 25, p. 204 (1908). Sec. 25, Proc. 110 of 1897.

cant had neglected to appeal within the usual fourteen days, although instructed to do so by his client.⁴²

Leave to appeal will not be granted unless the applicant can shew a good cause of action. Thus, where a native was obviously suing the wrong man, his application was refused.⁴³

Part X.—*Evidence.*

Hard-and-fast rules relative to the rights of litigants to lead evidence are not adhered to by the Courts of the Territories, when, through ignorance of procedure, one of the parties to an action has not produced all his evidence before closing his case.

In one case,⁴⁴ the Court held that a Magistrate was justified in allowing the Plaintiff to produce additional evidence after closing his case, because he thought it would assist him in arriving at a just decision.

In another case,⁴⁵ the Court said that, as the Appellant, through ignorance or stupidity, had not given his evidence, injustice might follow if the case were determined without it. Judgment against the Appellant was set aside, and the case was referred back for the additional evidence, with directions to the Magistrate to give judgment after recording it.

A similar procedure was adopted in another case where the Appeal Court wished to give the Defendant a further opportunity to lead evidence. In this instance the Defendant had closed his case without calling any witnesses.⁴⁶

Part XI.—*European-Native Actions.*

Proclamation ⁴⁷ provides that all civil suits, except those in which both parties are natives, must be tried according to Colonial law. It follows that Europeans cannot claim debts as being due according to Native customs.

Thus, while the head of a kraal might, under Native law, be held responsible to another native for the debts of a member of

42. Muzi *vs.* Bedlededle, K., 1903.

43. Wellem *vs.* Bobejaan, K., 1903.

44. Sibuka *vs.* Gwebu, K., 1903.

45. Makawula *vs.* Jabaza, K., 1908.

46. Nosenti *vs.* Sotewu, B., 1909; H., p. 117; W., p. 27.

47. Proc. 112 of 1879, Sec. 23.

his kraal, a European creditor cannot claim the privilege of holding the kraal-head liable.

It may be here mentioned that natives allege that they know of no custom whereby a kraal-head is responsible for his subordinates' shop debts.⁴⁸

As shewn elsewhere in this book, a native heir is responsible for payment to other natives of debts due by the man whose estate he has inherited under Native law. Until recently it was held that a native heir was not in the same way liable to European creditors of the deceased; for, according to Colonial law, no direct action lies against an heir, the proper procedure being to appoint an Executor, and proceed against him.⁴⁹

But this idea has since been set aside^(c) in two recent decisions.⁵⁰

In the first of these,⁵¹ the Plaintiff, a European trader, sued a native, in his capacity as eldest son and heir of his late father's estate, for a debt alleged to have been due by the deceased man. Exception was taken to the procedure, and the learned Judge in the Appellate Court, while upholding the Resident Magistrate who had thrown out the case, said: "I am not prepared to say that, if it had been shewn that Defendant (the heir) had been awarded by a Native Magistrate the whole of his father's assets, and was now in possession of them, there would not have been a suitable means of getting at him and making him pay the debts also which his father's estate was liable for, on equitable principles, not on the ground of his being heir, but by reason of his being possessor and custodian of the property."

48. *Class (Klass) vs. Mgqweqwe*, B., 1897; W., p. 5; H., p. 19. *Amos vs. Morai*, K., 1906.* *Sifuba vs. Mbaswana*, U., 1909; H., p. 222.

49. *Mbila vs. Spalding*, E.D.C., 1907. *Msindo vs. Moriarty*, J. 16, p. 539.

50. These decisions refer to estates of natives which should be wound up according to Native law (as to which estates are so wound up, see Chapter IX), and which the heir according to custom has actually adiated (see *Hartley vs. Ngwaleni*, S.C., 1910). In these cases the native heir is liable only in so far as the property inherited can meet the debt (see Chapter XII., Part IV.)

51. *Daines vs. Cekiso*, S.C., 1909.

(C) *Addendum*.—See note on page 98, where a European creditor's right of action against a native heir, under Proc. 142 of 1910, is explained.

In a still more recent case,⁵² one Maartens applied for an order directing the Master to call a meeting of next-of-kin in order that an Executor might be appointed to the estate of the father of one Lebenya. It appeared that the deceased had given Maartens an option to buy a farm within a certain number of years, and that, although Maartens had exercised his option, Lebenya, the deceased's eldest son and heir, refused or neglected to give transfer. Maartens, wishing to institute an action to compel transfer, sought first to have an Executor appointed, as, owing to the uncertain state of the law, he was doubtful whether he could compel Lebenya, who had himself not taken transfer, to carry out his father's contract. The Court held that Maartens could sue Lebenya, and that it was not necessary to have an Executor appointed. In the course of his judgment, the learned Judge said that the Court had frequently recognized the principle that a native heir succeeds to the property and liabilities of his father's estate; that in the case of natives residing in the Native Territories and not falling within certain categories specified by Sec. 37 of the Proclamation of 1879, the Colonial law had never been regarded as applicable; that the mere fact that a European asserts that he has a right of action against a deceased native, possibly for some trivial account, is not sufficient cause to involve the necessity of the appointment of an Executor.

Part XII.—*Allotment of Land.*^(D)

Under Proclamation,⁵³ it is the duty of headmen to submit to the Government officials a list of persons to whom they propose that land shall be allotted in their locations.

The Chief Magistrates are the proper authorities to distribute land on behalf of the Governor, in whom the power to allot land vests.⁵⁴

Headmen sometimes take these rights upon themselves, and exact fees from applicants. On such an irregularity being brought to the notice of the Court, it said⁵⁵: "No Government

52. Maartens *vs.* The Master and Lebenya, S.C., 1910 (full Court).

53. Proc. 110 of 1879, Sec. 43.

54. *Ibid.*, Secs. 40 and 43.

55. Mbumbulwana *vs.* Dokofani, K., 1903.

(D) This part is not intended to refer to locations to which Proc. 227 of 1898 has been extended.

headman has any right to demand an entrance fee from persons who wish to reside in the location, nor has he any right to locate people there without the authority of the Magistrate." (E) (F)

It may here be mentioned that it is not incumbent upon a native who wishes to vindicate his right, as against another native claimant, to a land or kraal site acquired by him under the provisions of Proc. 125 of 1903 or Proc. 19 of 1899, to seek redress from his Magistrate in the latter's Administrative capacity. Proceedings may be taken in the courts of law.⁵⁶

Part XIII.—*Water Rights:*

In explaining the rights of the inhabitants of a location to a stream running through it, the Court⁵⁷ said that such residents have a common right in the natural streams in the same way as they have a common right to graze stock on the location commonage; and that no person may divert a stream for his own private use without the consent of the other occupants who have interests therein. In the case quoted, the Court held that a custom of using the water of a stream for building purposes having existed for many years, the right of doing so had become established.

Part XIV.—“*Dikazi.*”

A “dikazi” is described in one dictionary⁵⁸ as “a woman who has lost her virtue.” In another dictionary⁵⁹ it is stated: “It is difficult to define this word, as it is used loosely. It does

56. *Mnyamana vs. Fishlo*, U., 1909; H., p. 258.

57. *Madonila vs. Mabande*, K., 1908.

58. W. J. Davis's *Kafir-English Dictionary*.

59. Kropf's *Kafir-English Dictionary*.

(E) The right to distribute thatch-grass growing on location commonages vests in the headman (not sub-headmen), subject to the right of appeal to the Magistrate of the District in his Administrative capacity (*Mhlsengi vs. Mahlubi*, K., 1905; *Nkwali vs. Ramafuli*, and *Kolobi vs. B. Moshesh*, K.)

(F) *Addendum*.—By Proc. 141 of 1910, it will become a criminal offence to remove or destroy thatch grass in the areas reserved in the Districts of Matatiele and Mount Fletcher for the growth thereof, without the consent of the Magistrate or headman. The care of such areas and the distribution of the grass therein will vest in the headman, and will be subject to review by the Magistrate.

not necessarily mean that a woman has lost her virtue, while it is not applicable to many women who are very immoral, *e.g.*, 'abarexezayo.' It is a term of reproach to all women who are husbandless, except the widows who have not left the places of their late husbands. A 'dikazi' may be a woman (not a girl) who has never had a husband; or one who has had one, but has been separated from him; or a widow who has left her husband's kraal. It is never applied to married women, however loose their character. It is applied to all marriageable women without husbands. To be in such condition is a great reproach. People must be very careful how they apply this term, as there are now Christian women who are single, but of irreproachable character."

The Appeal Court, at Kokstad, has held⁶⁰ that the term "dikazi" does not always mean a woman of loose character.

The same Court described as a "loose woman 'dikazi'" a widow who had had children of men while not living at her deceased husband's kraal, nor with a man allotted to her for the purpose of "seed-raising."⁶¹

A "dikazi" is, therefore, broadly speaking, an unmarried woman, a widow, or a divorced woman, whose value from a matrimonial point of view has depreciated. This is the usual sense in which the word is used.

Part XV.—*Maintenance.*

It sometimes happens that children and womenfolk are, for one reason or another, brought up and supported by persons other than their natural male guardians. The following cases furnish examples of claims for compensation for such maintenance:—

The reader will notice that in Griqualand East, where the dowries are larger than those paid in the other Territories, the maintenance fees are higher.

In one case,⁶² where three women (probably a widow and her two daughters) had been kept by the Defendant for a number of years, the Court, while giving judgment for their return to their guardian, ordered that two head of cattle from the dowries of each of the two girls should be paid to the Defendant.

60. *Piki vs. Madi*, K., 1905; H., p. 95.

61. *Nkwane vs. Ngakamatye*, K., 1903.*

62. *Nogubazo vs. Jako*, K., 1903.

In another case,⁶³ where a married couple had brought up, and received six head of cattle as dowry for, an illegitimate female child of the wife, the husband was awarded two head of cattle for maintenance, one of which was for the girl's marriage outfit.

In another case,⁶⁴ where a husband had died, and his heir did not claim the widow for many years, it was held that her own people were entitled to retain two extra head of cattle for her maintenance out of the dowry adjudged to be returned to the heir on her marrying again.

In another case,⁶⁵ where the Plaintiff had brought up the daughter of another native, and had paid for her "intanjana" and marriage outfit, he was allowed to deduct two head of cattle, or £12, which he claimed to be entitled to, from the dowry he had collected on the girl's marriage.

In another case,⁶⁶ a husband's heir claimed from his widow and her second husband seven children, and got judgment for one girl. The Court, while ordering the delivery of this girl, allowed five head of cattle at £5 each to the widow and her second husband, as compensation for their maintaining the child for "many years."

In another case,⁶⁷ five head of cattle were awarded for the maintenance of the Plaintiff's daughter born after the dissolution of his marriage with her mother. The child had been supported by her mother's people. Plaintiff was held to be entitled to possession only upon his paying the award.⁶⁸

In another case,⁶⁹ the Appeal Court said that Sec. 27, Act 15 of 1856^(g) did not apply to natives, and, although the Magistrate in the Court below considered that it was in the interests of two children claimed by their father that they should remain with their mother, they were ordered to be returned to him upon his paying two head of cattle for their maintenance.

63. *Nowata vs. April*, U., 1905; H., p. 98.

64. *Lutweni vs. Vava*, K., 1904.

65. *Daka vs. Mnyulwa*, K., 1905.

66. *Tshemsila vs. Stoffel*, K., 1907.

67. *Tshiki vs. Sodeli*, 1906.*

68. See also *Takayi vs. Mzambalala*, B., 1906; H., p. 121.

69. *Mangaliso vs. Nomanti*, U., 1908; H., p. 192.

(g) This Act was extended, as a whole, to the Territories by Proc. 206 of 1893. There is nothing in this Proclamation exempting natives from its provisions.

In another case,⁷⁰ the Court, acting on the expert evidence of its Native assessors, refused to allow the Defendant more than two head of cattle for maintenance of his grand-daughter, whom he had brought up and married off. The assessors stated that, irrespective of the period of maintenance, only one beast was claimable as compensation therefor.⁷¹ They further stated that, if the girl was also married from the kraal of the man keeping her, another beast became due for his trouble in this connection; and that, unless further expenses could be proved, the fact that the parties were Christians would not justify a larger amount of compensation being granted.

In another case,⁷² a divorced native, who had married under Colonial law, was ordered to pay his wife five shillings a month for the support of their child until it reached the age of sixteen years, or married.

In cases where a woman has been seduced, and her seducer, after paying the usual fine, wishes to adopt the child (which he has the right to do), he pays for its maintenance ("sondlo") at the time he takes it away from its mother's people.⁷³ The usual compensation paid is one, two, or three head of cattle.⁷⁴ If excessive maintenance is claimed, costs may be awarded against the party demanding it.⁷⁵

A husband is not liable, upon dissolution of marriage, for the maintenance of his children during the time they remained with his deserting spouse at her father's kraal.⁷⁶

Should a child be born of a wife while she is staying with friends, her husband must reimburse them for its support. One beast is usually paid.⁷⁷

70. *Sunduza vs. Mayigongo*, B., 1908; H., p. 216.

71. See also *Pungwana vs. Mini* (U., 1905; H., p. 89), where similar expert evidence was given, and one beast was allowed as maintenance of a three-year-old child fetched by its father after dissolution of his marriage with its mother.

72. *Mahlaka vs. Gcadinja*, K., 1903.

73. *Eliza vs. Kozia*, K., 1908. MacLean's Compendium, p. 66. *Colis vs. Matshowana*, B., 1901; W., p. 8; H., p. 47.

74. MacLean's Compendium, p. 66. See also *Eliza vs. Kozia*, where the facts shew that two head of cattle were paid on a child being fetched.

75. *Tshiki vs. Sodeli*, K., 1906.*

76. *Gotywa vs. Jiba*, U., 1907; H., p. 148.

77. *Ibid.*

Maintenance cannot be claimed under Native law for the support of a male child, as his services are considered sufficient compensation for his keep,⁷⁸ provided he is old enough to work, or herd cattle.

Part XVI.—*Native Calendar.*

Natives do not generally describe an event as happening in a certain calendar year, but as occurring before or after certain well-known historical incidents.

It is sometimes difficult to ascertain and fix a date to these incidents. The following table furnishes a fair guide:—

YEAR.	HISTORICAL EVENTS KNOWN AMONGST NATIVES.
1811	Grahamstown Founded.
1818	War of Amalinde (Debe Nek).
1819	Attack on Grahamstown.
1820	Arrival of the British Settlers.
1828	Death of Tshaka.
1828	Death and Defeat of Matiwane.
1829	Gaikas' Attack on Tembus.
1834	Hintsa's War.
1834-5	Fingo Emancipation.
1835	Hintsa Killed.
1835	Dingaan Killed.
1835	King William's Town Founded.
1841	Year of the Comet. Edward VII. Born.
1846-7	War of the Axe.
1850-2	Ulanjeni's War.
1851	Hermanus's Death.
1851	The Great Earthquake.
1856	A Great Rain.
1857	Cattle-killing Mania of the Ama-Xosa.
1862	A Great Drought.
1862	Adam Kok's Trek.
1866	Fingo and Tembu Emigration.
1867	Diamond Fields Discovered.
1871	Reverend Tiyo Soga's Death.
1873	Chief Makoma's Death.

78. Hlatuka *vs.* Mhlonhlo, U., 1901; H., p. 45.

YEAR.	HISTORICAL EVENTS KNOWN AMONGST NATIVES.
1873	Langalibalele's War.
1874	Transit of Venus (the Flood).
1877	Kreli's War.
1878	Tini Makoma Captured.
1878	Gaika Emigration.
1878	Battle at Gwiligwili (Keiskama Hoek).
1878	Gungubele Arrested (Tembu War).
1879	Zulu War (Isandlwana).
1879	Morosi's War (Basutoland).
1880	Stokwe's War.
1880	War with the Basutos (Disarmament).
1883	Cetywayo gave evidence before the Natives' Laws and Customs Commission.
1884	Death of Cetywayo.
1885	A Famine.
1886	Transvaal Gold Discovered.
1886	Red Water (cattle sickness).
1887	Queen Victoria's Jubilee.
1888	Release of Kaffir Chiefs from Imprisonment.
1888	Chief Sigcau installed as Pondo Chief.
1893-4	First War with Matabele.
1895	Jameson's Raid.
1896	Second War with Matabele.
1896	Rinderpest Plague.
1896	War with Galishwe, Toto and Luka Jantje.
1897	The Diamond Jubilee.
1899-1902	The Anglo-Boer War.
1901	Queen Victoria's Death.
1902	The Bubonic Plague.
1902-3	Mr. Chamberlain's Visit.
1902	Great Blizzard.

Part XVII.—*Noxal Actions.*

Whether damages can be claimed for injuries inflicted by one pasturing animal upon another on commonage grazing-ground depends, to some extent, upon whether the case is dealt with under Colonial or under Native law.

Under the latter law no action lies⁷⁹.

79. Mpopo *vs.* Tsuwenyane, K., 1905.

Thus, where the Defendant's rams covered Plaintiff's ewes out of season on a location commonage at night, the Court held that the Plaintiff was not entitled to damages in the absence of a regulation compelling proper care to be taken of rams, bulls and stallions.⁸⁰

If an animal, while trespassing, injures another, an action for damages lies under Native law, notwithstanding that the injured beast does not die.⁸¹

Damages caused by dogs to sheep and other pasturing animals must be made good, even if inflicted on common grazing-ground.⁸²

Under Colonial law, damages may be claimed only where there is *culpa* or negligence on the part of the owner of the animal causing the damage.⁸³

The Appeal Court, at Umtata, held⁸⁴ that sufficient *culpa* attached to Defendant to render him liable for the damage caused by his stallion to Plaintiff's horse on a location grazing-ground, when the former animal, while grazing unattended by a herd, had attacked the horse, and inflicted injuries which caused its death. The Court based its decision upon Colonial law.

Part XVIII.—“*Umbulunga*” Cattle.

The animal called an “umbulunga beast” is a cow or heifer given by a native to his daughter. This beast, along with its increase, is then the property of the woman,⁸⁵ but is executable for her husband's debts.⁸⁶ On dissolution of the marriage, the beast follows the woman.⁸⁷ It is customary for the woman, during marriage, to return to her father's people some of the progeny of the animal.⁸⁸

The woman, whether wife or widow, has the right—subject to the exceptions to follow—to take her “umbulunga” beast

80. *Mpopo vs. Tsuwenyane*, K., 1905.

81. *Passiya vs. Jolikati*, K., 1906.

82. *Moleka vs. Moloma*, K., 1905.

83. See Maasdorp's “Institutes of Cape Law,” Vol. iv., Chapter v. *Parker vs. Reed*, J. 2, p. 496.

84. *Zigebe vs. Jack*, 1908; H., p. 172.

85. *Culeka vs. Nobulauw*, K., 1902.

86. *Siwangobuso vs. Ngendana*, B., 1907; H., p. 142.

87. *Ibid.*

88. *Ibid.*

wherever she may go; for it is regarded by her as a sacred pledge, or protection of her interests.^(H) 89

A husband has no right to set off the animal against any debt due to him by his father-in-law, save only when the latter is liable to return his daughter's dowry.⁹⁰ In the same way, the woman's father, when sued for the return of her dowry, may set off "umbulunga" cattle in her husband's possession.⁹¹ It is not contrary to custom for the wife's father, or husband,⁹² to replace an "umbulunga" beast by another animal; as, for instance, when the original beast has died,⁹³ or her husband has made away with it.⁹⁴ An "umbulunga" beast is never taken out of the dowry (or increase thereof) paid for the woman to whom it is to be given. If her guardian has no other cattle, he generally exchanges an animal with a relative in order to obtain one.⁹⁵

In the event of the guardian having no cattle, it is permissible for a woman to go to a friend—whether a relative of her family or not—and ask for an "umbulunga" beast. Should such friend give her one, he is, if not already a blood relation, then considered one. The giving of this beast also entitles him to claim from her husband some of the woman's dowry. In the event of dissolution of the marriage, such person, if not a blood relative, could not be called upon to return a dowry-beast so given him; if, however, he was a blood relative, he could be compelled to do so.⁹⁶

Part XIX.—"Ngoma" ("Mafisa") Stock.

"Ngoma" stock are animals which their owner has, for one reason or another, given to some other native to keep for him. The stock is generally left with the man keeping them until they

89. Siduli *vs.* Nopoti, B., 1897; H., p. 20.

90. Mvalo *vs.* Malgas, B., ; W., p. 1.

91. Tshaka *vs.* Buyesweni, B., 1907; H., p. 144.

92. Siwangobuso *vs.* Ngendana, *supra.* Nosenti *vs.* Sotewu, B., 1906; H., p. 117; W., p. 27.

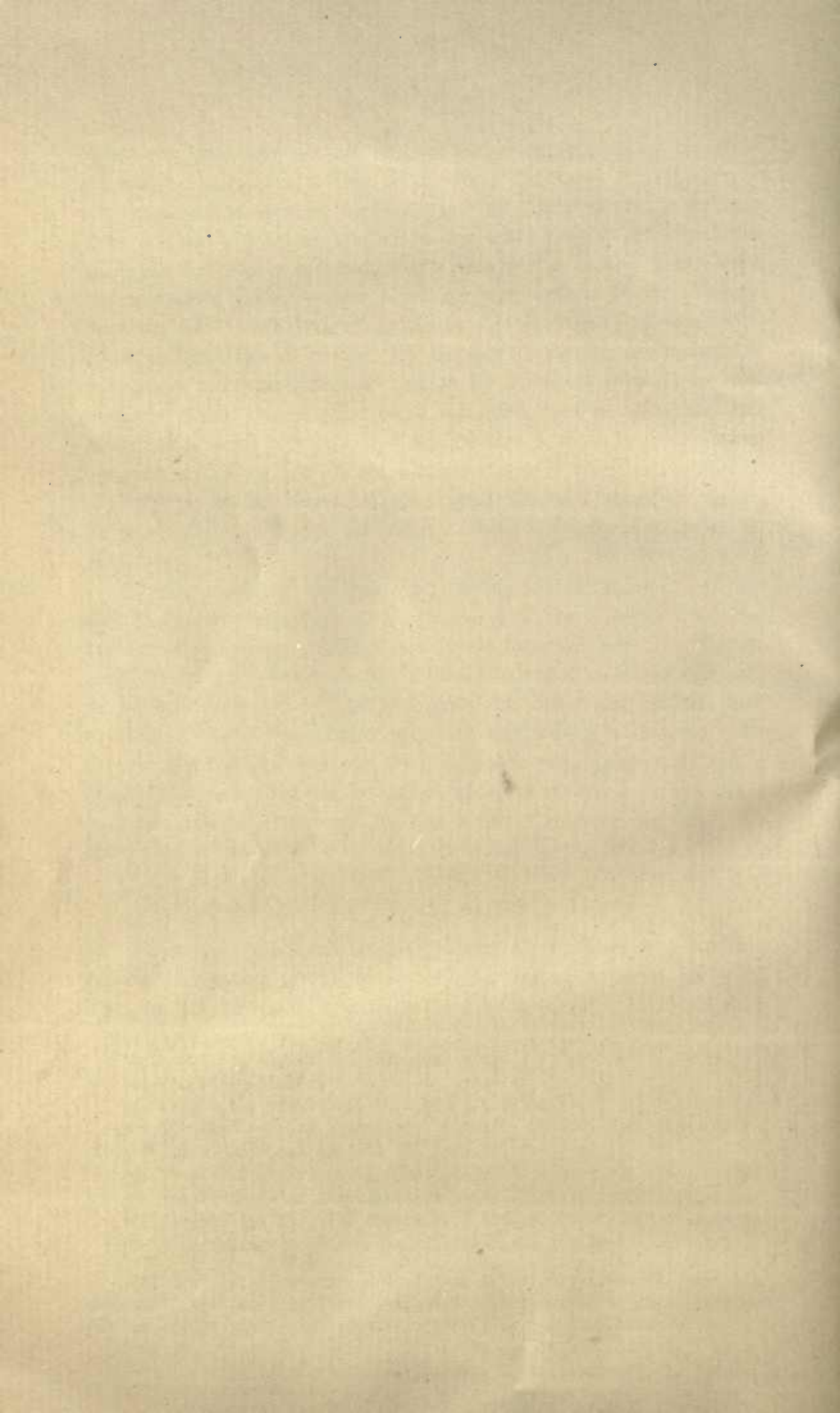
93. Nosenti *vs.* Sotewu, B., 1906; H., p. 117; W., p. 27.

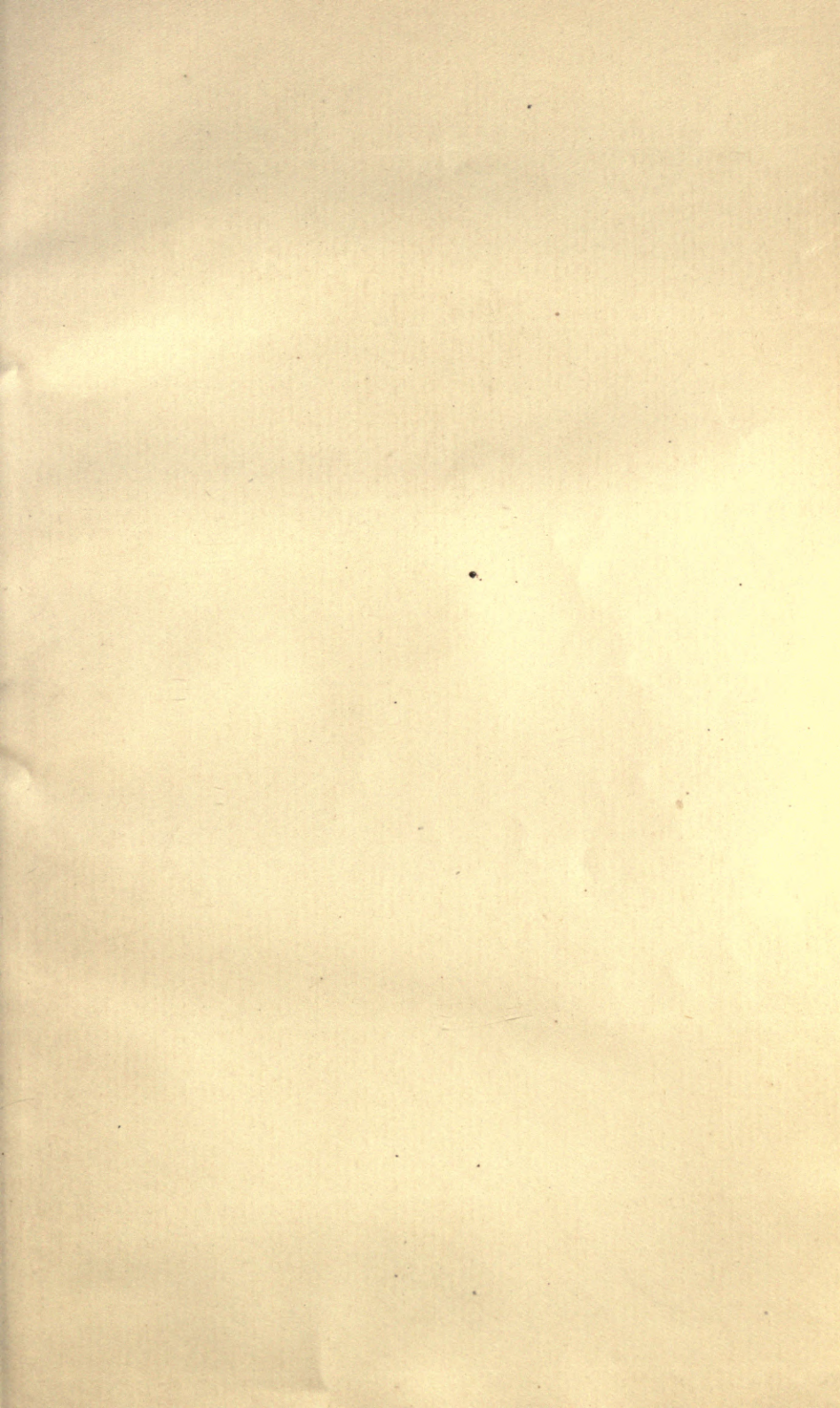
94. Siwangobusa *vs.* Ngendana, *supra.*

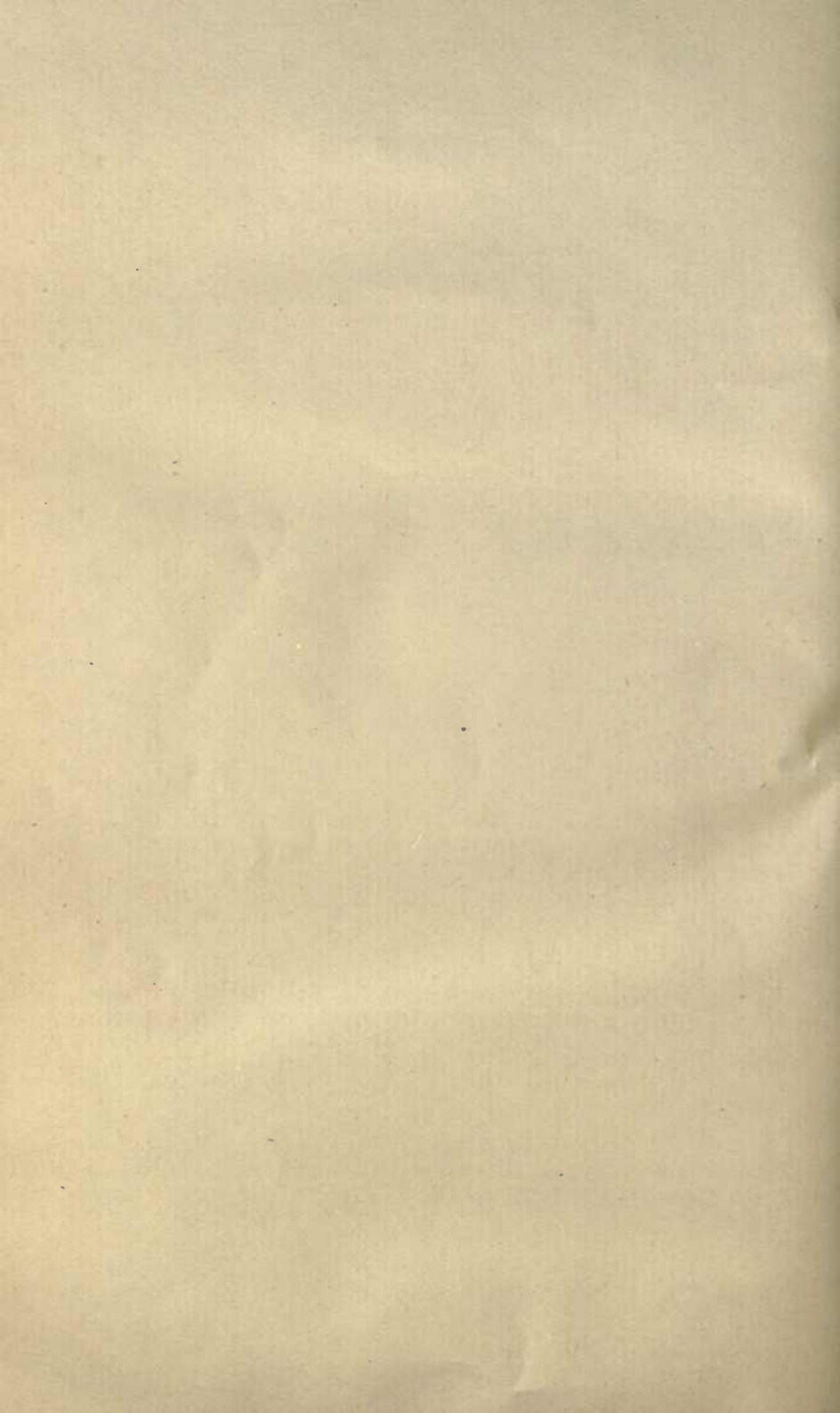
95. Zondani *vs.* Nile, U., 1908; H., p. 176.

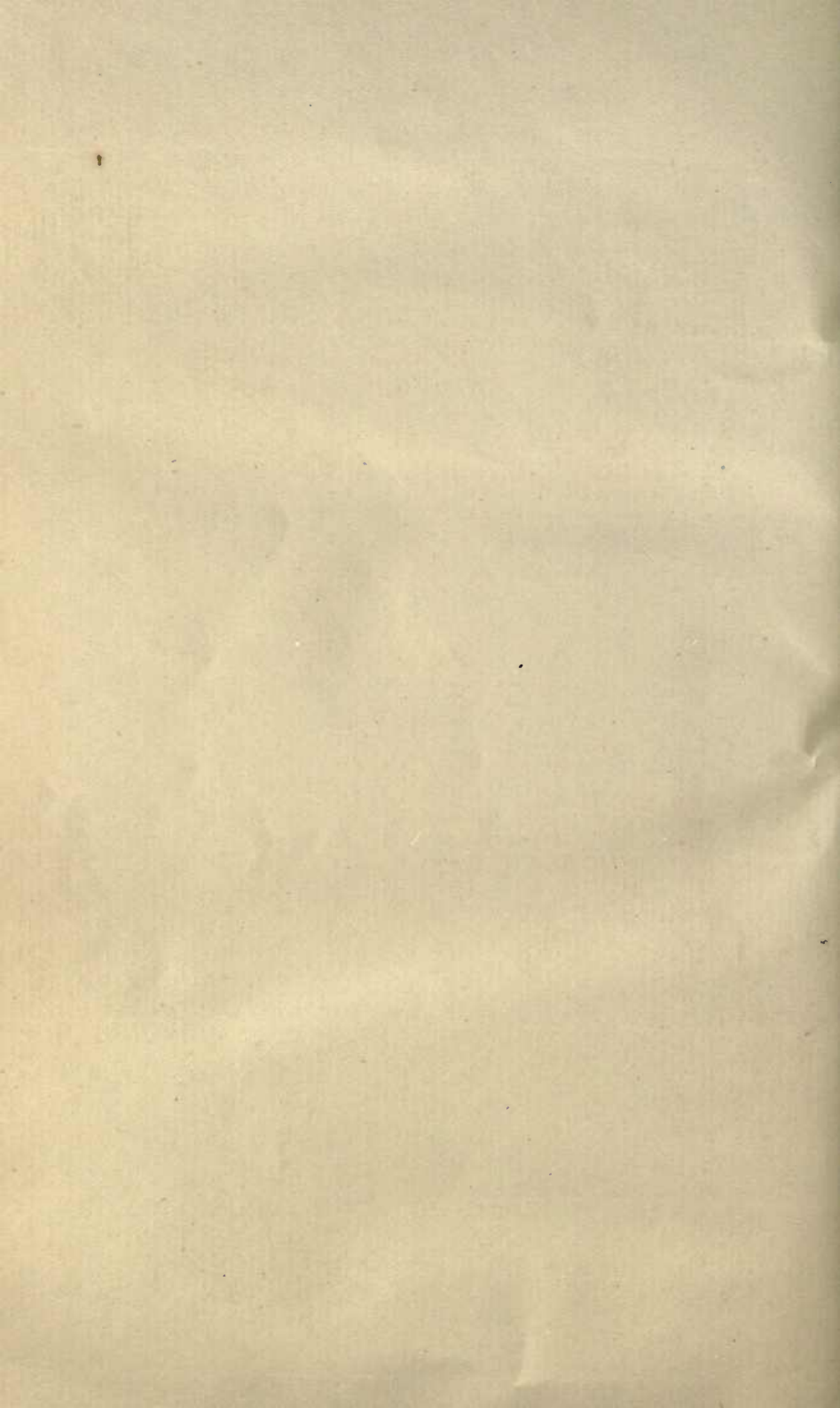
96. Siwangobuso *vs.* Ngendana, B., 1907; H., p. 142.

(H) The native women believe that a necklace of hairs from this animal's tail, if worn by them, will protect them from the ills of married life, real or imaginary, and ensure to them plenty of healthy children.









have increased. It is customary to pay him one or more of the increase for his services.⁹⁷ The native thus herding the stock has the use of the animals during the time they are with him.

The question arises whether the owner of "ngoma" stock may claim them from any person in whose possession he finds them, or whether he has only a personal action against the man to whom he had entrusted them.

In Griqualand East, in 1904, after taking expert evidence, the Court held that an *actio vindicatio* does lie in favour of the owner of "ngoma" stock against a *bona fide* third party in possession.⁹⁸

Amongst the natives in Tembuland the position is different, and, according to their custom, as interpreted in a decision in 1895, the owner of "ngoma" stock which have been disposed of to *bona fide* third parties for value has only a personal action for damages (including the price of the beast) against the man who had agreed to keep them.⁹⁹ It was, however, decided in 1907 that "ngoma" stock cannot be attached in execution for the debts due by the native with whom they were placed.^(J) ¹⁰⁰

Part XX.—"Paka."

"Paka" is a native term for a gift by a woman's father to her husband's people on the occasion of her marriage. It is paid to "decorate the bride," and varies according to the amount of dowry which passes hands.

The custom of giving "paka" is general amongst natives.¹⁰¹ Chief Pato of the Hlangweni tribe, in giving evidence on the subject, said: "Should twenty head of cattle have been fixed and paid as dowry, the usual 'paka' would be one ox, ten mixed goats, and a 'kapata,' £5 in money, and a beast for slaughter for

97. See facts *Sinyoto vs. Kunyama*, K., 1906.*

98. *Nqaka vs. Rabulaza*, K., 1904.

99. *Mavanda vs. Sokana*, U., 1895; H., p. 8.

100. *Siwangobuso vs. Ngedana*, U., 1907; H., p. 142.

101. *Ngamle vs. Nozinqane*, K., 1907; H., p. 151.

(J) These two decisions seem to be at variance, for, if the ownership of "ngoma" property vests in the depositary, it follows that the depositor has only a personal action against him, and the property is executable for the depositary's debts; if, on the other hand, the property vests in the depositor, he has a right *in rem* in such property against the whole world, and it could not be executable for the depositary's debts.

the bridegroom's party, to be killed the day the dowry is fixed. If dowry is not fixed, this beast is not killed. The goats are distributed by the bridegroom's father amongst the members of his kraal; the ox goes to the bridegroom's mother's hut, that is, the hut which has provided the dowry. The recipients of the beast can do what they like with the ox, as far as the girl's father is concerned. The gifts I mention are not fixed. A man pays according to what he is able to do when he receives dowry. What shall be paid as 'paka' is discussed when the dowry is fixed. The bridegroom's father is entitled to ask for certain things as 'paka.' When the parties cannot agree, a meeting is called to decide the matter. What is paid depends upon the wealth and inclination of the bride's father, and public opinion. 'Paka' is to decorate the daughter, and, if it is not paid, the girl feels insulted."

On this evidence the Court held that the payment of "paka" is a moral obligation, and, on the dissolution of the marriage in respect of which it is paid, no action lies for its return.¹⁰²

102. *Ngamle vs. Nozinqane*, K., 1907; H, p. 151.

A REPORT OF SOME OF THE MORE IMPORTANT
DECISIONS OF THE NATIVE APPEAL COURT,
GRIQUALAND EAST (KOKSTAD), 1901-8.

1901.

MBAMBALU

Defendant and Appellant.

vs.

MES.

Plaintiff and Respondent.

Claim: One ox, as damages for Defendant's elopement with Plaintiff's daughter.

The President of the Appeal Court gave judgment as follows:

"In this case it appears that Defendant's son, a minor, eloped with Plaintiff's daughter. The two families agreed that a marriage should be arranged between the young parties, and negotiations for this marriage are still going on. Meanwhile plaintiff asserts that, in spite of these negotiations, he is entitled to recover a good beast from Defendant's people as a fine for the elopement. Native expert evidence was led, but it did not materially assist in arriving at a decision. The Court below gave judgment for Plaintiff for the fine claimed.

"This Court holds that, while the marriage negotiations are in progress, the question of the fine should remain in abeyance, and allows the appeal with costs, altering the judgment of the Court below to 'absolution from the instance with costs.'"

1902.

Moyo

Defendant and Appellant.

vs.

KEMSHE.

Plaintiff and Respondent.

Claim: Two head of cattle seized under a writ of execution. The evidence shewed that Appellant had obtained judg-

ment, and had issued a writ, against Kemshe's father, one Jojo. Kemshe lived at his father's kraal. The Respondent contended that the stock seized from his father was his (Respondent's) own property.

The President, in the course of his judgment against Respondent, said:

"This [*i.e.*, the fact that the stock belonged to Kemshe] may, or may not, be true, nor does it affect the case, for, under Native law, the head of a kraal has full control of all stock belonging to members of his family, and he is also responsible for the acts of members of his kraal; and, seeing that Kemshe resides there, he is, under Native law, under his father's guardianship, and his father would have a perfect right to take his stock to satisfy debts contracted by himself or his son, and, as he did not satisfy the writ, the messenger acted rightly in seizing the two head of cattle, which are executable."

1902.

MDEBELE

Defendant and Respondent.

v.s.

MDEBELE.

Defendant and Respondent.

Plaintiff, who was defendant's younger brother, had sued Defendant, in his capacity "as guardian and administrator" of the estate of their father, for certain stock, alleged to be due to him (the Plaintiff). The Defendant had excepted to the summons as disclosing no ground of action. The Magistrate had upheld the exception.

The President, in the course of his judgment, said:

"In the opinion of this Court the exception should have been overruled, the summons shewing good cause of action, seeing that, under Native law, the guardian or administrator of an estate is responsible for the proper administration and distribution thereof. With natives the guardian is usually the eldest son of the 'great house,' and the heirs of the 'lesser' houses look to him for their shares, if any, of the estate."

1902.

QEDA

Defendant and Appellant.

v's.

BOBI.

Plaintiff and Respondent.

Plaintiff in the Court below had claimed the return of his wife, or her dowry.

The President, in confirming the Magistrate's judgment in Plaintiff's favour, said:

"This is the third time that Plaintiff has brought an action for the recovery of his wife, and it is to be regretted that he did not now sue for the dissolution of the marriage, as it is clear from the evidence that the woman is unwilling to live with him."

1903.

HLUPEKO

Plaintiff and Appellant.

v's.

MASIKINYA.

Defendant and Respondent.

Claim: £3 for corn sold.

Defendant's attorney had excepted to the summons, on the ground that Defendant, being a married woman, had no *legitima persona standi in judicio*.

The Magistrate had upheld the exception, and the President, in supporting his judgment, said:

"This Court agrees with the Magistrate's finding, as it is clear from the record that Defendant is the wife of Nomkokela, and resides at one of his kraals, and is supported by him. The fact of his having married another woman in accordance with Christian rites does not set aside his marriage with Defendant in accordance with custom, seeing that she did not take any steps for a separation."

1903.

MANYELA

Plaintiff and Appellant.

vs.

YAKUMINA.

Defendant and Respondent.

Plaintiff had claimed the return of twelve sheep, one bull and certain money, paid by him on account of dowry for Defendant's daughter, who was to have married Plaintiff's brother.

Plaintiff had failed to prove payment of the money. The President said:

"From the evidence it appears that a marriage was arranged between Plaintiff's brother and Defendant's daughter, which marriage never came off, and Plaintiff now claims the return of dowry paid. Defendant admits he received the beast and twelve sheep, but holds that he is entitled to this stock, as Plaintiff's brother eloped with the girl, and deflowered her. As a matter of fact, there was no elopement; but, in accordance with custom, the girl, after the proposed marriage was agreed to, was taken to the Plaintiff's kraal, and she was there deflowered, and subsequently taken back to the Defendant, and when the woman found that her virginity was gone, they, in accordance with custom, went and demanded the 'nqutu' beast, and the Plaintiff alleges he gave two sheep for slaughter. This is denied by Defendant, who states that the twelve sheep paid as dowry were taken as the 'nqutu.' This, however, is not in accordance with custom, as dowry stock cannot be converted into 'nqutu' cattle. The 'nqutu' sheep were in payment of the deflowering of the girl, and, as there was no elopement, Plaintiff is not liable for any further damages."

Judgment was thereupon given for Plaintiff for twelve sheep at 15s. each, and one beast at £10.

1903.

SAPULA

Plaintiff and Appellant.

vs.

MOULI AND ANO.

Defendants and Respondents.

Claim: Eleven head of cattle (less three beasts paid on account), as damages for the seduction of Plaintiff's daughter.

The seduction was admitted.

Plaintiff contended that he was entitled, according to Basuto custom, to a fine equal to half the dowry he would have received for the girl.

The President, in the course of his judgment, said:

"Three head of cattle, or their value, is sufficient compensation in cases of this nature, unless there are exceptionally painful circumstances in connection with the seduction," and that, in the absence of evidence on record to shew that the alleged Basuto custom existed, judgment must be given for Defendant.

1903.

LETELE

Defendant and Appellant.

vs.

TUKE.

Plaintiff and Respondent.

Claim: Return of a dowry (consisting of nine head of cattle, one horse and ten sheep), by reason of a wife's refusal to perform her lawful and domestic duties to her husband, one Tseuo.

The Magistrate had dissolved the marriage, and had given Plaintiff judgment for nine cattle and ten sheep. The facts are stated in the following extract from the President's judgment:

"From the evidence it appears that a marriage was arranged to take place between the Plaintiff's son, Patula, and Defendant's daughter, Namakele; and that, about the time the marriage was to have taken place, Patula died, and Defendant then agreed that the girl should be given to his younger brother, Tseuo, and this was done. It is clear that the girl never cared for this man, and they have lived unhappily together, and, though she remained at his kraal, her husband declares that she will not allow conjugal rights, and that she refuses to assist in the work of the kraal. It is also admitted that the woman committed adultery some little time back, and, taking all the circumstances of the case into consideration, this Court is of the opinion that the Magistrate acted rightly in dissolving the marriage, and that his judgment regarding the number of stock to be returned is a fair one; and Appeal will be dismissed with costs."

1903.

NKWANE

Defendant and Appellant.

vs.

NQAKAMATYE.

Plaintiff and Respondent

Plaintiff claimed seven head of cattle, or £70, damages for carnal intercourse by Defendant with a widow of Plaintiff's father.

The Magistrate had awarded Plaintiff two cattle, or £20. The evidence shewed that Defendant had made the woman pregnant.

The other facts are set forth in the following extract from the President's judgment:

"It is clear that when this [the intercourse] occurred the woman was not living at the kraal of her late husband, nor was she allotted as wife to any relative of his for the purpose of seed-raising. This being so, she would be looked upon as a loose woman, 'dikazi,' and, consequently, damages cannot be claimed from the Defendant, nor would he have any claim to the child, had it been born, which child would, in accordance with Native law, have been the property of the Plaintiff, he being heir to his late father's estate."

Judgment was consequently given for the Defendant.

1903.

MABUYANA

Claimant and Appellant.

vs.

ZAKE.

Respondent and Respondent.

This was an interpleader suit, in which the Appellant, on behalf of his absent son, one Gwaka, claimed certain stock which had been attached by Respondent in a suit of Zake *vs.* Mqokweni. Mqokweni was also a son of Mabuyana. The evidence shewed that Zake had obtained judgment against Mqokweni for dowry due for his (Mqokweni's) second wife, and that both Mqokweni and Gwaka resided at their father's kraal. The stock attached was Gwaka's property. The Magistrate had held the cattle to be

executable, on the ground that Mabuyana was liable to Zake for the dowry.

In the course of his judgment the President said that a father is not "responsible for the dowry of his son's second wife, unless he arranged the marriage with the woman's guardian. The mere fact that a son resides at his father's kraal does not make a father liable for all debts contracted by the son. In this case the girl's guardian had the remedy in his own hands, as he could have 'telekaed' her [Mqokweni's wife] and kept her until arrangements were made for the payment of her dowry." The cattle were declared not executable.

1903.

MZANDULI

Plaintiff.

vs.

BUKWANA.

Defendant.

Plaintiff claimed twenty-three head of cattle, balance of dowry, or, in the alternative, three head of cattle, balance of fine.

Both parties appealed.

From the record it appeared that Defendant had eloped with Plaintiff's sister, and soon after had returned her to her guardian with six dowry cattle. The girl had then been given to Defendant as his wife. In 1896, four more head of cattle were paid, and a "nqutu" beast. When the girl was given to Defendant, the guardian had stipulated that, if full dowry was not forthcoming, he was to retain as a fine the cattle already paid. No more cattle had been paid by Defendant. The woman was, at the time of the case, resident with Plaintiff. Plaintiff alleged that dowry had been fixed at thirty head of cattle.

The President said:

"This Court finds that the stock so paid was for dowry, and not for a fine, and it follows that the woman is Defendant's wife and it also finds that there was an arrangement, as alleged by Plaintiff, that, should the full dowry not be

paid, the cattle given as a part of it were to be retained by Plaintiff as compensation for the abduction of the girl
 The 'nqutu' does not count it" [as a dowry beast].

The Court, not believing that thirty head of cattle was the number of dowry stock agreed upon, fixed the dowry at "twenty head, which is the number usually paid by members of the Hlangweni tribe, there being nothing on record to shew the parties are chiefs."

The judgment of the Court was therefore "for the Plaintiff in convention for ten head of cattle, or their value, £30, which was the value before rinderpest, when they should have been paid. Tender to be made within six weeks from date, and, if accepted, the Defendant (Plaintiff in reconvention) to receive his wife and all his children. Should the Defendant not tender the £30, or should the woman refuse to return to him after the tender, the marriage is declared dissolved. The Defendant will then be entitled to his children born of the marriage, that is, the two girls, or their dowries when they marry. He will have no claim to the twins, as he declares they were not begotten by him, and were born at Plaintiff's kraal after his wife had left him. Whether the woman returns to her husband or not, the Plaintiff will retain the dowry cattle already paid."

1904.

GONIWE Defendant and Appellant.

v.s.

MAXAXA. Plaintiff and Respondent.

Claim: One beast for midwifery services.

The President, in his judgment, said:

"This is a case of Native midwifery, and is recognisable under the law. The Court finds that the services were rendered, and that the beast claimed is a fair remuneration for those services."

The appeal was therefore dismissed.

1904.

PAKKIES.

Defendant and Appellant.

vs.

BOLOKO.

Plaintiff and Respondent.

Plaintiff claimed seven head of cattle, one horse, ten sheep and one "nqobo" beast, being the balance of fifteen head of dowry cattle due to him by Defendant. The evidence shewed that Defendant's wife, for whom the dowry was due, had been a "dikazi" prior to her marriage, and that she had died nine years after the marriage, but before this action had been brought.

The President held that a "nqobo" beast (also called a "nqutu" beast) was not claimable by Plaintiff; further that Plaintiff was entitled to judgment for balance of dowry, *viz.*, six (not seven) head of cattle, or their value at £3 each, one horse, or £5, and ten sheep, or £5; and (in answer to Defendant's contention that full dowry could not be demanded for a "dikazi") that a full dowry had not been claimed for the woman, but fifteen head of cattle only.

1905.

BAVU.

Plaintiff and Appellant.

vs.

MPOFANA.

Defendant and Respondent.

Claim: Return of five head of cattle and six goats, being earnest cattle paid by Plaintiff in connection with his proposed marriage with Defendant's daughter.

Defendant pleaded that the girl in question had died in giving birth to a child of which Plaintiff was the father, and that, therefore, return of the dowry was not claimable.

In giving judgment for three head of cattle, or their value, £24, the President said:

"The death by childbirth is denied by the Plaintiff, who states the woman had a miscarriage, the result of whooping cough, and, as a result, she died. Complications seemed to have resulted from the above causes, and it has not been shewn that proper medical assistance was procured for the woman."

1905.

BISA. Defendant and Appellant.

vs.

ZIBUKWANA. Plaintiff and Respondent.

Claim: A declaration of rights, and the custody of the offspring of an alleged marriage between one Mbodla and a widow, named Maludaba.

The question in dispute was whether certain cattle paid by Mbodla were given as a fine for his intercourse with Maludaba, or for her dowry.

In supporting the Magistrate's judgment for Plaintiff, the President said:

"There is no doubt that the children are Mbodla's. The question is, do they belong to his estate? If the cattle paid were paid as dowry, then unquestionably they do belong to Mbodla's estate. The Magistrate has found as a fact that they were paid as dowry. It is not customary for dowry to be paid for a widow to her deceased husband's relations. If a widow is cohabiting with a man, and pregnancy follows, and a fine is imposed, the child born becomes his. This is also sound Native custom, and was not brought out in the case quoted. The Plaintiff is therefore bound to succeed in his claim for the children in any case."

1905.

CUNTSU. Defendant and Appellant.

vs.

HASHA Plaintiff and Respondent.

Plaintiff in reconvention claimed the return of his wife, or the dowry he paid for her, also the children born of the marriage.

In giving judgment the President said:

"The Defendant [*i.e.*, Plaintiff in reconvention] is clearly entitled to the return of his wife and family; failing this, a refund of portion of his dowry. Five children were born to him. The Plaintiff is entitled to retain one beast for each child, and two for the services of the woman. The marriage took place before rinderpest; therefore the value of the cattle will be reduced

to what the price then was The Magistrate's judgment is altered to one for Plaintiff in reconvention for the return of his wife and children, or, failing the return of his wife, the children and twenty-one head of cattle valued at £3 a head."

1905.

DELEKI Defendant and Appellant.

vs.

BANGO Plaintiff and Respondent.

Claim: Return of one Mabukwana, or her dowry (four head of cattle).

The record shewed that Plaintiff's brother had married Mabukwana, paying four head of cattle as dowry to Deleki. Five children had been born of the marriage, when the husband died. Deleki had then given her in marriage to another man, hence Bango's claim. The Magistrate had awarded Plaintiff one beast.

The President said:

"Seeing that only four head of cattle were paid as dowry for the woman, and that she bore deceased five children, the Magistrate was wrong in awarding the Plaintiff one of the cattle. The marvel is that the Defendant has not entered a claim for more dowry, and he would have been justified in 'telekaing' the woman before her husband's death."

1905.

FAROE. Defendant and Appellant.

vs.

MOLEKO. Plaintiff and Respondent.

Claim: Return of dowry paid for Plaintiff's son's wife.

The evidence shewed that Plaintiff's son had married Defendant's daughter by Christian rites. Plaintiff had, nevertheless, paid Defendant a dowry for her, according to Native custom. Thereafter, Defendant's daughter had obtained a divorce, on the

ground that her husband had committed adultery. The property of the marriage was ordered to be equally divided.

The President, in his judgment for Defendant, said:

"The Magistrate has given judgment for the restoration to Plaintiff of the 'lobola' paid by his son, and costs of suit, and has held that, 'under Native law, adultery is not sufficient ground to dissolve a marriage according to Native custom.' This is not sound Native custom; there are circumstances under which adultery is sufficient ground. It does not follow that, because a woman returns to her father, dowry is returnable; there are many cases where it is not, and the judgment of a Superior Court would be one of these. Apart from the above considerations, there has been a Christian marriage. Native men are always ready to accept the advantages of these marriages and none of the disadvantages; and the Plaintiff cannot now be allowed to benefit by the misconduct of his son. In the case of *Hebe vs. Mdlinelwa* (12 E.D. Court Reports), it was held that as the marriage was broken off owing to Plaintiff's misconduct, the Defendant was entitled to retain the 'lobola.' The present is a much stronger case."

1905.

NGEJANA.

Plaintiff and Appellant.

vs.

QWANE.

Defendant and Respondent.

Plaintiff sued her husband for the property he had set aside for her hut.

The Magistrate had found for Defendant.

The President, in sustaining his judgment, said:

"From the record it appears that Plaintiff is one of Defendant's wives, and that, on her husband marrying his second wife in accordance with Christian rites, Plaintiff left him and returned to her people, where she now resides, and that she then instituted the present action. So long as the Defendant lives, the stock set aside for the use of his different 'houses' is his; hence, the Plaintiff could not possibly succeed in her claim. She would have a right to maintenance, provided that she agreed to

reside at his kraal, or at any other kraal where he decided to place her. Having elected to leave him, she can look to the person who received her dowry for maintenance, and, if he refused it, she could compel him to provide for her."

1905.

MAKOPO AND NYANI.

Defendants and Appellants.

vs.

TSIKUANE

Plaintiff and Respondent.

Claim: Five cattle, or their value, £50, for the adultery of Defendant with Plaintiff's wife.

The President's judgment was as follows:

"The Magistrate has found that in this case the status of the Plaintiff entitles him to a greater number of cattle than is usually paid for adultery. Whilst this Court concurs that fines and dowries amongst Natives range according to the status of the parties, great care should be taken, and satisfactory proof aduced, that such is the case. The Appeal is dismissed with costs."

1905.

MQATSHUKWA.

Defendant and Appellant.

vs.

MATSHOMELA.

Plaintiff and Respondent.

Plaintiff sued (*a*) for the return of three cattle, being balance of dowry he had paid for his wife Toti; and (*b*) to be declared owner of six cattle and two calves (forming the remainder of such dowry) now in his possession.

The Magistrate had found for Plaintiff.

The President, in upholding his decision, said:

"It is clear from the evidence that the woman, Toti, was married to Plaintiff, and that she went to live a short while with him, and then left, and on being asked to return, restored the cattle at that time at the kraal to Plaintiff. When a marriage is

complete, the increase, in nearly all cases, is not returned, but there are exceptional cases. Two cows in calf were paid as dowry, and the presumption is that the calves returned are those of these cows. The cattle were returned almost immediately, apparently within a month of their being paid, and the Plaintiff is entitled to succeed."

1905.

MANGQUBULA.

Defendant and Appellant.

vs.

MADOLSHI.

Plaintiff and Respondent.

Claim: Return of balance of dowry (a cow and its calf).

The President, in upholding the Magistrate's judgment for Plaintiff, said:

"The number of cattle paid is admitted. Two of the cattle have been restored, and the Defendant objects to restore the balance. The woman appears to have been for only a short period with the Plaintiff. She has borne him no children, and there is nothing to shew why all the dowry should not be returned. The woman's services, for the short time she was with Plaintiff, are compensated for by the use Defendant had of the cattle."

1905.

MAQUBU.

Plaintiff and Appellant.

vs.

SITINI.

Defendant and Respondent.

Plaintiff claimed the return of his wife, or her dowry (twenty-one head of cattle).

The Defendant contended that Plaintiff's conduct justified his being deprived of his wife and dowry.

The President, in his judgment, said:

"Very little evidence was taken as regards the number of cattle paid and as to the extent of the ill-treatment the woman is said to have received at the hands of Plaintiff. It is true that he assaulted her; but this Court is of opinion that this is hardly

sufficient to cause him to lose most of the cattle he gave for her, and the appeal is allowed, and the case is sent back to the Magistrate, who will kindly take evidence on the points mentioned."

1905.

MAYEZA.

Defendant and Appellant.

vs.

NTSHONTSHO.

Plaintiff and Respondent.

Claim: Eight head of cattle, or their value £80.

The President, in supporting the Magistrate's judgment for Plaintiff, said:

"From the record it appears that the Defendant . . . wished to marry one Emily, daughter of Morosi, and his father, Plaintiff in the present case, did not approve of his doing so, and refused to pay dowry for the girl. Defendant then sued in the R.M. Court, Matatiele, for an order compelling him to provide the necessary cattle, and the Magistrate's finding was in his favour. Plaintiff then handed him certain cattle (the number is in dispute), with which to pay Morosi the dowry due to him, and he now finds that Defendant retained, for his own use and benefit, a portion of these cattle, and he claims them, on the plea that Morosi will look to him for the balance of dowry due to him. Defendant admits that six head of the cattle are still in his possession, and, seeing that they were handed to him for a specific purpose, which he has not fulfilled, he has no right to them."

1905.

MORURI.

Plaintiff and Appellant.

vs.

MORURI.

Defendant and Respondent.

Claim: A wagon and live-stock, or their value.

In supporting an absolution judgment by the Magistrate, the President said:

"From the evidence it appears that the Plaintiff's deceased father, Simoko Moruri, was married in Basutoland in accordance

with Christian rites some fifty-two years ago; and that subsequently, he settled in the Matatiele District about the year 1877 with his wife until about the year 1890, when she died. A year or two after, he married the Defendant, also in accordance with Christian rites, and they lived together till 1902, when Simoko died. . . . The first point to be decided is whether or not the deceased had apportioned any property to the Plaintiff's 'house,' and, if so, should it be dealt with under Basuto, or Colonial, law. Plaintiff claims that all the property in his father's possession at the time of his second marriage belonged to his mother's hut It is clear that no property was set aside by the deceased for this hut Had he apportioned stock to this hut, as he should have done, the Court is of opinion that Basuto law would apply, seeing that the parties were under this law when they married, and the mere fact of the marriage being in accordance with Christian rites would not make any difference. Of course, if the deceased had given Plaintiff any stock, or acquiesced in his retaining any which he had handed to him for safe keeping or any other purpose, it would belong to him, and could not be taken from him. Seeing, then, that the deceased has neglected to make any provision for the 'house' of the first wife (it is alleged that he intended to do so), it follows, that, when he married the second time about the year 1890 in accordance with Christian rites at Mt. Fletcher, where Colonial law obtained, all his property came into community, and, at his death, should have been dealt with under Colonial law; and it is advisable that early steps should be taken for the appointment of an Executor."

1905.

MPHOMANE.

Defendant and Appellant.

vs.

MPHOMANE.

Plaintiff and Respondent.

Plaintiff claimed, on behalf of her children, that they should be declared heirs to the "right-hand house" of one Khaene.

In giving judgment, the President said:

"From the evidence it appears one Khaene, a Masuto, married several wives; there was no heir to the 'right-hand house,' and the youngest son, Willem, of the 'great house,' was placed

in this hut as heir to it. After this son's death, his widow was 'ngenaed' by Khaene's second son, Nqala, and the children of these people are now claiming to be heirs to the 'right-hand house.' It is clear from the evidence that Willem was appointed heir to the 'right-hand house,' and the children raised up by Nqala to him must succeed him according to Sesuto, or any other Native, custom."

1905.

MPOPO Plaintiff and Appellant.

vs.

TSUWENYANE. Defendant and Respondent.

Claim: £14, as damages, by reason of Defendant's rams covering Plaintiff's ewes.

In supporting the Magistrate's judgment for Defendant, the President said:

"From the evidence it appears that the parties to the suit reside in the same location, and use the same grazing lands for their stock, and that Plaintiff's flock of goats and Defendant's rams slept on a certain ledge of rock, which extends from near Plaintiff's kraal to Defendant's, and that the goats mixed at night. There is no doubt that the Plaintiff suffered damage. . . . However, the part of the location in which the goats mixed is common to both, and each had a right to have his goats there; this being so, the Plaintiff cannot succeed in this action. The case is a hard one, but, there being no Government regulations to compel persons residing on lands held in common to take proper care of rams, bulls and stallions, this Court cannot do otherwise than sustain the Magistrate's judgment."

1905.

NTWAPANTSI. Defendant and Appellant.

vs.

MAZEKA. Plaintiff and Respondent.

Plaintiff claimed a declaration of rights as to whom the children, born of his daughter, Ngcingi, belonged.

In his judgment for Defendant the President said:

“From the evidence it would appear that Defendant eloped with Plaintiff’s daughter and then offered to marry her, and, as it is the custom, sent her back to her father with four head of cattle, one beast having been paid as ‘reporting’ beast. Plaintiff objected to Defendant, but retained his cattle. Subsequently, Defendant seduced the girl, and the result was the birth of one of the children now claimed. Plaintiff then claimed that the four head of cattle were forfeited by reason of the seduction. Defendant again carnally knew Ngcingi, and the result was another child, for which Plaintiff claimed further damages, *viz.*, four head of cattle. Defendant also paid a horse as dowry. Had Defendant paid full dowry and the marriage been consummated, he would be entitled to claim that any stock paid as a fine for the seduction be merged in the dowry; failing this, having paid a full fine for the first seduction and pregnancy, he is entitled to claim the child, the result of that pregnancy, and, on payment of a further fine, to claim the second child. It is not usual for our Courts to allow the same number of cattle for a second pregnancy as for the first, as that may lead to more immorality than is at present tolerated under these objectionable Native marriage customs. The Plaintiff cannot succeed in this action. The children are with him. Defendant has a clear claim to the first child, and can, by payment of a fine or dowry, establish a claim to the second child.”

1905.

NGWALENI.

Plaintiff and Appellant.

vs.

LINGEZWENI.

Defendant and Respondent.

Claim: Return of balance of dowry (namely, one beast and one horse or their value, £20 and £10), paid in connection with a marriage which had never taken place.

Defendant, in his plea, alleged that Plaintiff had eloped with, and seduced, his intended bride, and was thus not entitled to the return of his stock. He admitted receiving three cattle, and one horse, and £10, but said that the horse had died, and that its

death had been reported to the Plaintiff's mother, as Plaintiff's father would not see the messenger (one Gwanga). The report was denied by Plaintiff.

In giving judgment for Plaintiff, the President said:

"A fine for seduction followed by pregnancy merges in the dowry when a marriage takes place. The 'cleansing beast' and 'nqutu' are all that can be claimed when seduction is not followed by pregnancy. Therefore Defendant has been compensated for the seduction of the girl." [Presumably because he had received three cattle and was asked to return one only.]

Regarding the report made on the death of the horse, the President said:

"The circumstances surrounding the case favour a strong presumption that Gwanga did make the report, and that report is, in the opinion of this Court, sufficient."

1905.

THAKUDI AND ANO.

Defendants and Appellants.

vs.

JACOB.

Plaintiff and Respondent.

Plaintiff claimed eight head of cattle, as damages for the adultery committed by second Defendant with Plaintiff's mother (a widow).

This case came twice before the Appeal Court. In the first instance, it was referred back to the Magistrate, the President remarking:

"There appears to be some misapprehension as to the ruling of the Court in regard to adultery with a woman not 'ngenaed,' which was that a seed-raiser could not be sued for adultery, or sexual intercourse, with a widow. This ruling should not be construed to mean that damages may not be recovered for sexual intercourse with a widow. These cases must, each and all, be dealt with on their merits, and according to the custom of the tribe to which the parties belong."

On the case coming up the second time on Appeal, the President said:

"This is an Appeal from the Court of the Resident Magistrate of Matatiele. Plaintiff sues Defendant for adultery. Plaintiff is the son of the woman with whom the adultery was committed. It appears Plaintiff's father died, and his uncle 'ngenaed' his mother. The question has been raised as to who is the proper person to sue. The damages paid will belong to the estate of the deceased husband. Though the woman 'ngenaed' is in the same position as a wife, the man 'ngenaing' her has no right, if there are heirs to the estate, to any of the property. The action has, in the opinion of this Court, been rightly brought. Where a woman is not 'ngenaed,' there is no action for adultery when she takes an outside man as 'seed-raiser' to her deceased husband. When 'ngenaed,' she has the same privileges, status and responsibilities as a wife."

1906.

AMOS.

Plaintiff and Appellant.

vs.

GIDEON MORAI AND JOSHUA MORAI, Defendants and Respondents.

Plaintiff sued the Defendants jointly for £9 as and for money advanced to the second Defendant. First Defendant was the second Defendant's guardian.

The Magistrate had found against both Defendants, and the first Defendant appealed.

The President, in absolving the first Defendant from the instance, said:

"Under Native law, a guardian is not responsible for all his ward's debts; for instance, it has been ruled that the guardian is exempt from the payment of shop accounts contracted by his ward without his knowledge and consent. There is nothing on record to shew that Gideon is responsible for the debt in question. In fact, it would appear that Joshua raised the money for which he is now sued without consulting Gideon in the matter."

1906.

MNYAMANA.

Plaintiff and Appellant.

vs.

POTWANA.

Defendant and Respondent.

Plaintiff claimed from his father, the Defendant, certain stock belonging to his (the Plaintiff's) mother's hut.

In giving judgment against Plaintiff, the President said:

"From the record it appears that the Plaintiff is Defendant's son, and that he has sued his father for certain stock said to have been apportioned to his mother's hut, and this Court is of the opinion that, allowing that such stock was so set aside, which is doubtful, Plaintiff has no right to claim it during his father's lifetime. The next point is, had the Defendant the right to disinherit the Plaintiff as he has done? According to Native custom, a father has the right to disinherit his eldest, or any, son, for good and sufficient reason, and the proper procedure is for him to call a meeting of the chiefs and principal men of his clan, and to state publicly that, from that date, he discards his son, giving his reasons for doing so The disinheritance need not be final. The Defendant would have the right to publicly reinstate the Plaintiff as his heir, provided he saw good cause for doing so."

 1906.

MOEITI.

Defendant and Appellant.

vs.

NTHAKO.

Plaintiff and Respondent.

Plaintiff claimed a woman and four children.

From the record it appeared that Plaintiff's father Mokhadimetso had married the woman in question; that she had left him, and that he made no effort to reclaim her. She had then lived with the Defendant, and had had children by him. Subsequently, Defendant had paid dowry for her.

In deciding whether the children born belonged to Plaintiff or Defendant, the President said:

"After argument, in which Mr. Hargreaves quotes the case

of Molongwane *vs.* Koti, in which it was held by this Court that children, born before dowry was paid, belonged to the woman's guardian, it is now of opinion that this judgment cannot be taken as a precedent in all similar cases, seeing that it was there influenced, in a great measure, by the expert evidence given by the Chief, George Moshesh, which subsequent inquiries shewed was not a correct interpretation of Native law on this point. In the Lower Territories it was always held that, where a woman left her husband with the intention not to return to him, the marriage must be taken as dissolved from the date on which she left him; his redress being against her guardian for the recovery of the cattle he paid for her; and it was also held that it is the husband's duty, when his wife leaves him, to take steps within a reasonable time to get her back, and that he would not be justified in leaving her to live with another man as his wife. In this case the Plaintiff's late father appears to have done nothing to get the woman back, and the first effort to recover her was made by his son . . . and the Court decides that, in the case now before it, the marriage which existed between the woman and the deceased, Mokhadimetso, must be considered as dissolved from the time she left him, and that consequently her subsequent marriage to the Defendant was legal, and that the children, born to him by her, are his."

1906.

JANTJE HOMANS.

Plaintiff and Appellant.

vs.

MANGOSA AND BAASOF.

Defendants and Respondents.

Plaintiff claimed from Defendants (the one paying, the other to be absolved) three cattle, as compensation for the seduction of his daughter by second Defendant while he was visiting first Defendant's kraal.

In his judgment the President said:

"Defendants' attorney excepted to the summons on the ground that Baasof resided in the Barkly District, and that Defendant, Mangosa, was not responsible for his acts while at his kraal, seeing that he was there as a visitor for a short time only.

The Magistrate thereupon dismissed the case, and the record supports his finding, and the Appeal is dismissed."

1906.

POHLOANA.

Plaintiff and Appellant.

vs.

MGQIBELO.

Defendant and Respondent.

Claim: Three head of cattle as a fine for Defendant's carnally knowing Plaintiff's daughter.

The Magistrate found for Defendant.

The President upheld him, and in the course of his judgment said:

"From the record it appears that, some years ago, the Defendant married the Plaintiff's daughter, and, after living with her for some time, they separated; why, it is not very clear. Defendant then sued the Plaintiff before the headman, Lekhapa, for the return of his dowry cattle, and got judgment. Plaintiff returned most of the cattle, and consequently the marriage which existed between his daughter and Defendant was dissolved. He now enters a claim against Defendant for compensation, on the ground that he had spoiled his daughter. This claim should have been advanced before the headman, and, seeing that he did not do so, and that he elected to carry out the judgment given against him, he must abide thereby."

1906.

PHOLO MATIA, *q.q.*

Plaintiff and Appellant.

vs.

MOALOSI.

Defendant and Respondent.

Plaintiff, in his capacity as guardian of Mpumela, sued Defendant for damages for his adultery with a woman named Memotseko.

The record showed that the parties were Basutos, and that one Sechacha had died leaving a widow, named Memotseko, and

a minor son, named Mpumela; that shortly afterwards Sechacha's father had arranged for another of his sons, the Plaintiff Pholo, to enter the deceased man's hut and to "ngena" the widow; that this had accordingly been done; and that thereafter Defendant had, it was supposed, committed adultery with Memotseko, for which action Plaintiff, *q.q.* sued for damages. The question had arisen whether Plaintiff was the proper person to sue. The Magistrate had found he was not.

The President, in confirming this decision, said:

"The custom of 'ngena' does not obtain among the Basutos only, but is practised by the Fingos, Bacas, Pondos and other tribes. . . . After carefully going into this case the Court is of opinion that the fact that Plaintiff 'ngenaed' the woman does not oust his father from the guardianship of his deceased son's minor child, and it is also of opinion that it would be absurd to have two guardians with concurrent powers, seeing that their interests would sooner or later clash, and probably lead to litigation between them."

1906.

TSHEKI. Defendant and Appellant.

v.s.

SODELI. Plaintiff and Respondent.

Claim: A certain girl child, named Nogijama, and the right to all dowry paid for her.

The Magistrate had found for Plaintiff for the child on condition that he paid two head of cattle, for its maintenance, to Defendant.

In the course of his judgment the President said:

"The record shews that Plaintiff paid Defendant ten head of cattle as dowry for his daughter, Nxayi, who lived with him as his wife for about a month, and then left him and returned to her father's kraal. In the opinion of this Court, the woman having lived with the Plaintiff for the time stated, and dowry having been paid for her, she was his wife. On her refusing to return to him, the Plaintiff sued the Defendant before the headman for all the cattle he had paid for her, and the headman awarded him

the lot, and thereby dissolved the marriage. Plaintiff will be entitled to the child he claims (which Defendant admits was begotten by him) on the payment of a sufficient maintenance fee, which the Court fixes at five head. . . . The Defendant's claim for eleven head of cattle for maintenance of the child is preposterous, and he will pay the costs in the lower Court." |||

1906.

MKUTU. Defendant and Appellant.

vs.

SIGOAU. Plaintiff and Respondent.

Claim: Five head of cattle as damages for Defendant's adultery with Plaintiff's wife. The adultery had been proved, and Plaintiff had been awarded five cattle by the Magistrate.

The President reduced the fine to three head of cattle, or their value £5 each, saying:

"The only point to be decided is whether or not the award of five cattle is excessive, and, taking all the circumstances of the case into consideration, and especially the fact that only one act was proved, and that the Defendant does not appear to have had repeated sexual intercourse with the woman, it is decided that too many cattle were adjudged to Plaintiff."

1906.

MLINGANISO. Defendant and Appellant.

vs.

MNGEDANE. Plaintiff and Respondent.

Claim: Three head of cattle, damages for adultery committed at Defendant's kraal by Plaintiff's wife and some third party.

The President, in his judgment for Defendant, said:

"From the record it appears that Plaintiff is married to Defendant's sister, Nomdaniso, and that some time back she

visited the Defendant's kraal, and that while there she became pregnant, and disclosed the name of the adulterer, one Ntosaki. The Plaintiff has no claim against the Defendant, and his proper course was to have sued the alleged adulterer."

1906.

TETI. Defendant and Appellant.

vs.

MTYENISWA. Plaintiff and Respondent.

Claim: Return of dowry.

In the course of his judgment the President said:

"From the evidence it is clear that Plaintiff had five children by his deceased wife, Nomakesi, and that they all died before the death of their said mother, Nomakesi; and, under these circumstances, the Plaintiff is entitled, in accordance with Native custom, to the return of part of the dowry he gave for her."

(The report of the judgment did not state how many cattle were ordered to be returned.)

1906.

MOKI. Defendant and Appellant.

vs.

MPANGWA. Plaintiff and Respondent.

Claim: Return of earnest stock, namely, three head of cattle and six goats.

The Magistrate had found for the Plaintiff.

The President, in his judgment, said:

"It is clear from the record that Plaintiff eloped with Defendant's daughter with the intention of marrying her, and paid three head of cattle and six goats on account of dowry. Defendant then informed Plaintiff that he required eight horses and ten head of cattle for the girl. Plaintiff considered this too much, and, in a fit of passion, said he would not have her, and Defendant

could retain the cattle he had already given; but, of course, he did not mean this. After hearing the arguments, this Court is of opinion that, as the girl was not seduced, the Magistrate's judgment is correct."

1906.

MARIA NONGWE (ASSISTED BY HER HUSBAND)

Plaintiff and Respondent

vs.

WILLIAM SIBIDLA.

Defendant and Appellant.

Plaintiff claimed from Defendant, who was her brother and natural guardian, a declaration of rights in respect of (a) the dowry received from the kraal of her first husband, one Booi; (b) the dowry paid to Defendant by Plaintiff's present husband, Hendrick Nongwe; and (c) the dowry received by Defendant for the Plaintiff's children Lizzie and Martha.

The record shewed that Plaintiff had first married one Jantje Booi, who had paid dowry for her. Booi had died, and she had then married her present husband, Hendrick Nongwe. By Booi she had had two daughters, Lizzie and Martha. Previous to his death Booi had handed Defendant certain property, and Defendant had collected, or was collecting, the dowries for Lizzie and Martha.

The Magistrate had given Plaintiff judgment for the property which Defendant had received from Booi, and had held her to be entitled to the custody of the dowries paid, or to be paid, for Lizzie and Martha, the Defendant to be freed by the judgment from all responsibility to the heirs of Jantje.

The Defendant appealed.

In his judgment the President said:

"This Court is of opinion that the Magistrate has not the power to absolve the Defendant from his responsibilities to the heirs of Jantje Booi, and it is also of opinion that under Kafir law and custom, the Plaintiff has no right to the custody of any stock handed to the Defendant by Jantje Booi, nor has she any right to the dowries of her daughters, Lizzie and Martha, the Defendant being their proper guardian. Had the Plaintiff re-

mained a widow, the Defendant would have been bound to provide for her, and had a dispute arisen between them, and it was shewn that Defendant was neglecting her, the Court would probably have compelled him to maintain her; but having married again, she should look to her husband for support. It would be a most dangerous precedent to place her in charge of the stock she has claimed, seeing that she is pretty certain to be married in community of property, and if her husband were to make away with the cattle, what redress would the heirs of Jantje Booï, or Defendant, have? For he would plead that he had a right to them through his wife. Native law is quite clear with regard to the Defendant's rights. He is the proper person to be in charge of the girls and the stock, until claimed by the heir to Booï's estate; and should no heirs appear, the Government, which has taken the place of the Chief, would be entitled to the estate, provided that it cared to advance a claim thereto. The Appeal will be allowed and the Magistrate's judgment altered to one for Defendant."

1906.

SINYOTO (ASSISTED BY MAKELENI) Plaintiff and Appellant.

vs.

KUNYANA.

Defendant and Respondent

Claim: Seven head of cattle (being one heifer calf and its subsequent increase) left by Makeleni with Defendant's father.

The Magistrate had found for Plaintiff.

The record shews that Makeleni "nqomaed" a certain cow to Defendant's father. The facts occurring thereafter are set forth in the President's judgment, in which he said:

"This cow [*i.e.*, the 'nqomaed' animal] had two or three calves, and was subsequently taken by Makeleni, leaving a small calf with the Defendant's father. This heifer (calf) has had six increase, and the Plaintiff now sets up claim to this stock In the opinion of this Court the evidence fully supports the Defendant's contention that the original calf was given to his deceased father for services rendered in regard to the cattle."

In touching on other points raised by the Plaintiff, the President said:

"From the record it appears that the Plaintiff's father died when Plaintiff was a very young child, and he was brought up under the guardianship of Makeleni, who would, of course, be in charge of his ward's estate, and in the position of a trustee, and accountable to the ward, when he came of age, for his management thereof. . . . The Magistrate states, as his chief reason for his finding, that under Native law it is necessary for the guardian, when disposing of trust cattle, to have his ward present; this is not so, however, and, in fact, it would be ridiculous to have, say, a baby in arms, taken to watch the proceedings in some cattle deal, which are of frequent occurrence amongst the natives when managing stock under their guardianship."

1906.

MXOGWANA.

Plaintiff and Appellant.

vs.

TSHAKA.

Defendant and Respondent.

Plaintiff claimed to be declared heir of his mother's hut.

Defendant was the legitimate son and heir of the second wife of one Magojela. Plaintiff was the illegitimate son born after Magojela's death, of one of his other wives.

In giving judgment for Defendant, the President said:

"From the record it appears that, many years ago, a man named Magojela died, and that during his lifetime he had three wives, the Defendant being heir to the second hut. No sons were born to the first hut, nor did he have a son by the third wife, Nomakati. After his death, his half-brother, Lukalo, 'ngenaed' the woman, and had several children by her, of whom the Plaintiff, Mxogwana, is one. The point to be decided is whether or not the woman was "ngenaed" in accordance with custom. Lukalo admits that there was no ceremony, and that the members of the family were not called when he took the woman, and this shews that he was simply cohabiting with her, and that all children begotten by him would be under the guardianship of the late Magojela's heir, that is, the Defendant."

1906.

MXOTWA.

Plaintiff and Respondent.

vs.

GRIFFITHS AND ANO.

Defendants and Appellants.

Claim: Six head of cattle, damages for seduction.

The Magistrate had given Plaintiff judgment for five head of cattle.

In upholding the Magistrate, the President said:

“The only point to be decided is whether or not the Plaintiff is of sufficient standing in the tribe to warrant the allotment of more than the usual three head of cattle, allowed in similar cases. The Magistrate found that this was so, and this Court sees no just cause to disturb his finding.”

1906.

PASSIYA.

Plaintiff and Appellant.

vs.

JOLIKATI.

Defendant and Repondent.

Claim: £16, damages by reason of Plaintiff's ox being gored by Defendant's bull.

The Magistrate had found for Defendant.

The President, in giving judgment, said:

“The record shews that Defendant's bull visited Plaintiff's kraal, and that, while there, gored one of Plaintiff's oxen, doing it considerable injury, and unfitting it for work for some time; in fact, Plaintiff holds it has been internally injured to such an extent that it will never be fit for hard work.

“The Magistrate based his decision on the ground that, according to Pandomise custom, damages cannot be claimed for injuries caused by a bull, unless the damaged animal dies. This Court is of opinion, however, that the customs of minor tribes cannot override ordinary Kafir law, which provides that the owner of animals which have been damaged at his own kraal by other animals, which have no right to be there, has a right to compensation. Had Defendant's bull injured Plaintiff's ox on

the common grazing lands, it is doubtful if he would have been liable in damages; as it is, he will have to compensate Plaintiff for the loss he has sustained; and the Appeal will be allowed, and the Magistrate's judgment altered to one for Plaintiff for £10, the damaged ox to be handed to Defendant."

1906.

CHIEF PATA.

Plaintiff.

vs.

MSHIYWA.

Defendant.

Claim: (1) Thirteen head of cattle, as damages for Defendant's adultery with Plaintiff's wife, and (2) the custody of two children.

The Magistrate had given Defendant judgment for the children, and had awarded Plaintiff ten head of cattle as damages for the adultery.

Both parties appealed.

From the record it appeared that Plaintiff had married a woman, named Mankombi, and they had not lived happily together. She had eventually returned to her people, and had subsequently gone to live with Defendant as his wife, and had had two children by him. These were the children in dispute.

The President, in his judgment, said:

"It is very clear from the evidence that the woman had no intention to return to Pata, and he should have taken steps within a reasonable time to get her back; failing which, he had his remedy against her guardian for the return of the dowry cattle he had paid for her. He neglected to do this, and tacitly allowed the woman to remain with Defendant, and bear him children, and he now sets up a claim to them on the ground that she is his wife. This Court has held, in similar cases, that the marriage must be considered as dissolved from the time the woman finally leaves her husband; and it sees no just cause to depart from that ruling in this case, seeing that the Plaintiff

simply wishes to gain by his own neglect in not suing for his wife or her dowry at the time she left him, being content, apparently, that she should breed children for him by another man; and the Court will not support this sort of thing. That the Defendant looked on the woman as his wife is proved by the fact that he refused absolutely to pay a fine for adultery, though quite willing to pay dowry for her. Plaintiff endeavoured to shew that the two head of cattle he (Defendant) gave were paid as a fine, but the evidence shews clearly that they were given as dowry, the woman's brother and guardian being present when they were handed over. This Court agrees with the Magistrate in his finding with regard to the children, and the Appeal noted by the Plaintiff is dismissed with costs. It cannot, however, agree with his decision in regard to the woman, as it is of opinion that her marriage with the Plaintiff was dissolved when she finally left him and went to the Defendant's kraal, and there lived with him as his wife. The cross-appeal will therefore be allowed with costs in both Courts, and the Magistrate's judgment altered to one for the Defendant."

1906.

SIDONA AND ANO.

Defendants and Appellants

vs.

KAZIWA.

Plaintiff and Respondent.

Plaintiff claimed eighteen head of cattle, balance of dowry due for his sister, one Nomacabana, who married Defendant's deceased eldest brother.

The evidence shewed that Defendant's deceased brother, one Makubalo, had married Plaintiff's sister, and twenty-five head of cattle had been fixed as her dowry. Of these, fifteen had been paid, leaving ten head still due, for which judgment had accordingly been given. Defendant was Makubalo's heir.

In upholding the Magistrate's judgment, the President said:

"This Court sees no cause to interfere with the Magistrate's finding, it being understood that Defendant is liable as heir to Makubalo's estate, and only in so far as the estate can meet its liabilities."

1907.

NONYAMA.

Plaintiff and Appellant

vs.

NTSHWAYIBA.

Defendant and Respondent.

Plaintiff claimed from Defendant a certain boy, named Silandana, and a girl, the minor children of his deceased son, one Ntele, and he also claimed, on behalf of the boy, twelve head of cattle and £15, which he alleged had been paid as dowry by the late Ntele for his wife (who was the children's mother). The ground on which Plaintiff claimed a refund of dowry was that Defendant had given Ntele's widow in marriage to another man, and had received a second dowry for her.

Exception had successfully been taken in the Magistrate's Court "that the summons should have been brought in the name of the heir (Silandana), assisted as far as needs be by his guardian."

The President said:

"Seeing that it is clearly stated in the body of the summons that Plaintiff is claiming in his capacity as guardian, and on behalf of Silandana, the exception is overruled, and the case sent back to be tried on its merits."

1907.

MKATULELA AND LINDA.

Defendants and Appellants.

vs.

LUCUKU.

Plaintiff and Respondent.

Claim: Balance of dowry, being twenty-four head of cattle, and one horse, due to Plaintiff's daughter, Nontombi, who had married second Defendant.

The Magistrate had given Plaintiff judgment for twenty-three head of cattle and one horse.

The evidence shewed that first Defendant's eldest son, one Keto, had married, or had been about to marry, Plaintiff's daughter, Nomatayo, when she died; and that twenty head of cattle had been paid as dowry for her; that the first Defendant

had then agreed with Plaintiff that another of his (Plaintiff's) daughters, one Nontombi, should marry the second Defendant, and that ten more head of cattle were to be paid as additional dowry. Some cattle were then paid on account, leaving a balance of eight head of cattle still due to Plaintiff.

In giving judgment for Plaintiff for eight head of cattle only, the President said:

"This arrangement is not in accordance with the usual custom, as the second girl should have been handed to Keto to replace his deceased wife. The Court is of opinion that there was such a special arrangement, as it is not likely that Mkatulela would have agreed to pay full dowry for the second girl, seeing that he was entitled to the return of the dowry cattle paid for the deceased woman unless she was replaced by another girl."

1907.

MLAGWANA.

Plaintiff and Appellant.

vs.

SILOSINI.

Defendant and Respondent.

Plaintiff claimed, *inter alia*, £2 paid as an "nyobo fee" to Defendant by some third party, in connection with a woman, called Ntshombi.

The President, in dismissing this claim, said:

"In regard to the claim for £2, it has been decided in this Court that 'nyobo' fees cannot be claimed, seeing that the 'nyobo' custom is an immoral one.

1908.

NTEBELE.

Plaintiff and Appellant.

vs.

MADAPUMA.

Defendant and Respondent.

Claim: Certain cattle bought by Defendant from one Molefe.

The facts of the case were as follows: In January, 1907, one Molefe and one Makuauoane (widow—formerly "great wife"—of one Morokoane) had sued Ntebele for the possession of the

estate of Morokoane, and, more especially, for ten head of the estate-cattle which Ntebele had "mafisaed" to a third party. Judgment had been given for Defendant, and no Appeal had been lodged. In April, 1907, the same parties had sued Ntebele for a declaration of rights, to have it decided whether Molefe or Ntebele was the heir to the estate of Morokoane. Judgment had been given in Ntebele's favour, and Plaintiff had appealed.

During the time the case had been on appeal, Molefe had begun to dispose of such estate property as he and Makuauoane had in their possession. Makuauoane had subsequently stated that this had been done with her consent. The object of the disposition was to preclude Ntebele from obtaining his inheritance in case he might be successful in the Appeal Court. Ntebele's attorneys, who had heard that Madapuma was about to buy, or had bought, some of the estate stock, gave him notice of the facts of the case, which facts, however, were already well known to him. Madapuma, nevertheless, had paid Molefe for the stock, and had sold them again. It was for the return of this stock that the present suit was instituted.

The President, in giving judgment, said:—

"There can be no question that this disposal [*i.e.*, the disposal of the stock by Molefe to defendant] was not for the benefit of the estate or the widow, but purposely to defeat the rights of the Defendant in the Court below, if he was successful in the Appeal. With a full knowledge of the result of all the cases, the Respondent in the present action, well knowing that, by the judgment of the Court in both cases, Ntebele Morokoane was recognised as the heir to the estate of the late Morokoane, purchased four head of cattle from the first-named Plaintiff in the case mentioned, and passed a promissory note in his favour. This action disposes of the contention now set up that Molefe Morokoane was acting as agent of the widow Makuauoane, as, in that case, the note would have been in her favour; and, notwithstanding notice to the contrary from the Appellant's attorney, Respondent disposed of the said stock, and paid the promissory note, after the receipt of the notice.

"This Court finds that the sale of the stock was intentionally to defeat the judgment given, and that the Respondent purchased the cattle with a full knowledge of this.

"The Appeal is allowed . . . and judgment in the Magistrate's Court altered to judgment for Plaintiff as prayed."

Claim: £25, damages for libel.

“The Magistrate is certainly correct in his views that, under Native law and custom, an action for slander could not be maintained, but he has overlooked the wording of Sec. 23, Proc. 112 of 1879, which directs that all suits and proceedings in the Magistrate’s Court shall be dealt with according to the law in force in the Colony of the Cape of Good Hope, the intention primarily being that, as far as possible, Colonial law is to be applied, but, in order to meet special cases in which such law would not be applicable, provision is made whereby the Magistrate, in cases between native and native, may deal with them according to Native law.

“ The Magistrate’s discretion is a judicial one, and it follows that, in cases where there is no remedy under Native custom, Colonial law should apply. This view is borne out in a recent decision of the Supreme Court. Under Native custom, no action lay for damages arising from injuries sustained by assault; but, notwithstanding Native custom, the Supreme Court has ruled that such actions can be maintained. The Native law in both instances is identical. It is clear that in cases of slander, or libel, the Magistrate should be guided by Colonial law, but in assessing damages, he would rightly take into consideration the conditions obtaining amongst natives. What may essentially be an injury in the case of a European may not be so in that of an ordinary native. In the present case, the summons discloses no grounds of action.

“The contingencies upon which the Appellant contends that he has suffered, or may suffer, damage, are too remote.

"The appeal is dismissed"

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